

2006

Rex Wilkinson and Coventry Cove v. Morgan County Board of Appeals, Michael McMillan and Ann McMillan : Brief of Appellee

Utah Court of Appeals

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M. Darrin Hammond; Smith and Knowles; attorneys for appellants.

Benson L. Hathaway, Stephen W. Geary; Kirton and McConkie; attorneys for appellees.

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IN THE UTAH COURT OF APPEALS

REX WILKINSON and COVENTRY	:	
COVE, LLC,	:	
	:	
Petitioners/Appellants,	:	Appellate Case No.: 20060895
	:	
vs.	:	
	:	District Court Civil No.: 050500103AA
MORGAN COUNTY BOARD OF	:	
APPEALS, MICHAEL McMILLAN and	:	Oral Argument Requested
ANN McMILLAN,	:	
	:	
Respondents/Appellees.	:	

BRIEF OF APPELLEES MICHAEL AND ANN McMILLAN

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR MORGAN COUNTY, STATE OF UTAH,
HONORABLE MICHAEL D. LYON

M. Darrin Hammond
SMITH KNOWLES, P.C.
4723 Harrison, Suite 200
Ogden, Utah 84403

Attorneys for Appellants

Benson L. Hathaway, Jr. (#4219)
Stephen W. Geary (# 9635)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

*Attorneys for Appellees
Michael and Ann McMillan*

FILED
UTAH APPELLATE COURT
MAR 19 2007

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4723 Harrison, Suite 200
Ogden, Utah 84403

Attorneys for Appellants

Benson L. Hathaway, Jr. (#4219)
Stephen W. Geary (# 9635)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

*Attorneys for Appellees
Michael and Ann McMillan*

PARTIES TO THE PROCEEDING

Pursuant to Utah Rule of Appellate Procedure 24(a)(1) and (b), Appellees Michael and Ann McMillan note that the caption of this matter on appeal contains the names of all parties.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Morgan County Board of Appeals (the “Board”) correctly concluded, within the degree of discretion the Board should be accorded, that the McMillans timely appealed the Morgan County Council’s decision to the Board.

STANDARD OF REVIEW

This is an appeal from a summary judgment granted by the District Court, affirming the decision of the Morgan County Board of Appeals. On such an appeal, the appellate body does not review the decision of the District Court, but rather reviews the underlying decision of the subject agency. *See Carrier v. Salt Lake County*, 2004 UT 98, ¶ 17, 104 P.3d 1208 (“When a lower court reviews an order of an administrative agency and we exercise appellate review of the lower court’s judgment, *we act as if we were reviewing the administrative agency decision directly*’ and ‘do not defer, or accord a presumption of correctness, to the lower court’s decision.’”) (quoting *Cowling v. Board of Oil, Gas & Mining*, 830 P.2d 220, 223 (Utah 1991)) (emphasis added).

Review of a county land use decision is limited to “(1) review for whether a board’s decision was conducted in an arbitrary or capricious manner, and (2) review for whether the board’s decision illegally violated a statute, ordinance, or existing law.” *Carrier*, 2004 UT 98 at ¶ 26 (citing *Patterson v. Utah County Bd. of Adjustment*, 893

P.2d 602, 603-04 (Utah Ct. App. 1995)). Appellants Rex Wilkinson and Coventry Cove LLC (collectively, “Wilkinson”) have only challenged the Morgan County Board of Appeals’ interpretation and application of Utah Code § 17-27a-704 (2005). *See* Appellants’ Brief at 1. Therefore, only the second type of review, for illegality, is implicated. *See Cowling* at ¶ 26.

In reviewing a county land use decision for illegality, the Court “review[s] a local agency’s interpretation . . . for correctness, *but also afford[s] some level of non-binding deference to the interpretation advanced by the local agency.*” *Id.* at ¶ 28 (emphasis added).¹

DETERMINATIVE STATUTES

Utah Code § 17-27a-704 (2005), the version in effect during the relevant time, provided:

- (1) The county shall enact an ordinance establishing a reasonable time to appeal a decision of a land use authority to an appeal authority.
- (2) In the absence of such an ordinance and at a minimum, an adversely affected party shall have ten calendar days to appeal.

The statute was subsequently amended, and now provides:

¹ In *Cowling*, the Utah Supreme Court addressed the issue of the county’s interpretation of a county ordinance. The court’s rationale, however, explicitly extended this standard to the interpretation of statutes, as well: “This intermediate approach provides a proper balance by affording respect to the local agency’s specialized knowledge while ensuring that the interpretation of ordinances *and statutes* remains firmly within the province of the courts.” *Id.*

(1) The county shall enact an ordinance establishing a reasonable time of not less than ten days to appeal to an appeal authority a written decision issued by a land use authority.

(2) In the absence of an ordinance establishing a reasonable time to appeal, an adversely affected party shall have ten calendar days to appeal to an appeal authority a written decision issued by a land use authority.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Wilkinson appeals the Morgan County Board of Appeals resounding rejection of Wilkinson's Coventry Cove subdivision project, but does so on the single, narrow issue of whether the McMillans timely appealed that development to the Morgan County Board of Appeals. Both the Board and the District Court concluded that the McMillans' appeal was timely.

B. COURSE OF PROCEEDINGS

On May 17, 2005, the Morgan County Council gave final approval to a subdivision proposal submitted by Wilkinson.

On June 16, 2005, the McMillans appealed that approval to the Morgan County Board of Appeals. R. 549.² The Board accepted briefing from the McMillans,

² **FOOTNOTE REGARDING RECORD CITATIONS:** Record citations are potentially confusing in this appeal because of the consolidation of three different district court proceedings that were all eventually consolidated under the lowest case number: *Morgan County v. McMillan*, District Court Case No. 050500103; *Coventry Cove v. Morgan County Board of Appeals*, District Court Case No. 050500109; and *Parkview Properties v. Morgan County Board of Appeals*, District Court Case No. 050500110. Although consolidated, the record in each separate matter begins at R.1. Because the majority of citations in this brief are to the record in *Coventry Cove v. Morgan County Board of Appeals*, citations herein to "R. n" are to that record. Citations to the record in

Wilkinson, and the Morgan County Attorney (who supported Wilikinson). On the evening of November 10, 2005, the Board held a public hearing on the appeal, at which the McMillans, Wilkinson, and the County Attorney all presented witnesses, evidence and argument.

On November 23, 2005, the Board issued their Finding of Facts and Conclusions of Law and Order. R127-42. The Board found numerous flaws in the County's approval of Wilkinson's subdivision, observing that "the Planning Commission and County Council repeatedly failed to follow its [sic] own ordinances, policies and requirements." R. 141. The McMillans' appeal was granted, and approval of the subdivision rescinded. *Id.*

With regard to the timeliness of the appeal, the Board concluded:

Utah Code 17-27a-704 established the time for appeal. Morgan County did not have at the time of the passage of this statute a clear time period by which an appeal must be filed. Subparagraph 2 of this statute reads "In the absence of such an ordinance and at a minimum, an adversely affected party shall have ten calendar days to appeal." This Board interprets "at a minimum" to mean "at least." Therefore the McMillan appeal was timely.

R. 134 (conclusion 42).

the other two matters will be indicated as "R. *n* (Morgan County)" or "R. *n* (Parkview)." It is hoped that this will relieve the confusion.

On or about December 2, 2005, the Morgan County Attorney, purporting to act on behalf of the County and Wilkinson, petitioned for review of the Board's decision. R. 1 (*Morgan County*). On the McMillans' motion, the District Court dismissed the County's petition, as the County was not "adversely affected" by the decision of its own Board of Appeals. *See* R. 396 (*Morgan County*).

On or about December 19, 2005, Wilkinson also sought review of the Board's decision. R. 1.

On or about December 20, 2005, Parkview Properties, a purchaser of some of the lots in the disapproved Wilkinson subdivision also sought review. R. 1 (*Parkview*). Parkview Properties ultimately dismissed its claim, shortly after the District Court ruled that the McMillans timely appealed to the Board. *See* R. 154-57 (*Parkview*); R. 390 (*Morgan County*).

On August 14, 2006, on cross-motions for summary judgment, the District Court granted judgment to the McMillans, upholding the Morgan County Board of Appeals' decision. R. 736-41. Wilkinson has appealed to this Court.

C. STATEMENT OF FACTS

1. Wilkinson owns the land for the Coventry Cove subdivision in Morgan County, adjacent to the Old Highway and on the south east edge of Mountain Green. R. 127 (findings 1-2).

2. The McMillans live directly across the Old Highway and downstream from the proposed subdivision. *Id.* (finding 5)

3. On May 17, 2005, the Morgan County Council gave final approval to the subdivision, and a development agreement was signed on May 18, 2005. *Id.* (findings 3-4).

4. On June 16, 2005, the McMillans appealed the Council's approval to the Morgan County Board of Appeals. *Id.* (finding 6).

5. On November 10, 2005, the Board held a public hearing on the appeal, at which the McMillans, Wilkinson, and the County Attorney all presented witnesses, evidence and argument. R. 581-661.

6. On November 23, 2005, the Board issued its Finding of Facts and Conclusions of Law and Order. R. 127-42.

7. The Board found the following violations of Morgan County ordinances in the County Council's approval of the subdivision:

- a. no deduction in the number of units permitted was made for unbuildable stream area, R. 130 (finding 23);
- b. the subdivision was located in a "sensitive area," based on previous flooding and proximity to the Wilkinson Dam, which was required to be preserved as open space, no such considerations or deductions were made, *id.* (finding 24);
- c. the County Council approved the transfer of development rights between differently-zoned sections of the subdivision, when no ordinance permits the transfer of development rights, R. 130-31 (findings 25-27);

- d. the County Council approved bonus densities for affordable housing, public trails, opens space, and a mixture of housing types, but the subdivision did not qualify for any of these bonuses, R. 131-32 (findings 28-33);
- e. the County Council approved a proposed Bed & Breakfast that failed to have any frontage on a County road, as required by ordinance, R. 133 (finding 38);
- f. the agendas advertising the approval process before both the Planning Commission and the County Council mis-stated or failed to state the lot sizes, R. 133 (finding 39); and
- g. zoning for part of the subdivision had been changed without proper notice, R. 134 (finding 40).

8. Specifically on the issue of the timeliness of the McMillans' appeal, the Board considered the following:

- a. Senate Bill 60, enacting Utah Code § 17-27a-704 took effect May 2, 2005, R. 614 (transcript at 129:8-9);
- b. the County enacted an ordinance in August 2005 allowing 30 days to appeal to the Board, R. 614 (transcript at 129:14-16);
- c. the McMillans' appeal, which was opposed by the County, was the only appeal falling within these two dates and affected by the question of whether the appeal time was 10 days or 30 days, R. 615 (transcript at 134:25-135:5);

- d. a survey of appeal times in 24 other jurisdictions, showing that only 5 had appeal limits of 10 days, and the remaining 19 all had longer appeal periods, R. 615 (transcript at 133:13-21);
 - e. the Morgan County Planning Office's historical practice (going back at least as far as December 2001) of instructing appellants of a thirty-day appeal deadline, R. 616 (transcript at 137:5-138:8);
 - f. the Morgan County Council's and Morgan County Planning Commission's historical practice of allowing thirty days for an appeal, R. 616 (transcript at 138:10-23);
 - g. the County's delay in asserting a 10-day deadline to appeal, R. 617 (transcript at 143:24-145:25);
 - h. the plain language of Utah Code § 17-27a-704, R. 614-19 (passim).
9. The Board concluded that the McMillans' appeal was timely. R. 134 (conclusion 42).

SUMMARY OF THE ARGUMENT

The plain language of Utah Code § 17-27a-704 (2005), the Legislature's subsequent amendment of the statute, and the evidence before the Morgan County Board of Appeals all support the Board's conclusion that the McMillans had at least thirty days to appeal the Morgan County Council's decision to the Board. As the McMillans appealed their decision within that time, the appeal was timely. Even if the Board's decision were not perfectly correct, the same points also establish that the Board's

decision was within the discretion it should be accorded as the entity charged with applying the statute.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE MORGAN COUNTY BOARD OF APPEALS' DECISION AS A CORRECT APPLICATION OF UTAH CODE § 17-27a-704 (2005).

The essence of Wilkinson's argument is that Utah Code § 17-27a-704 (2005) set a 10-day time limit for the McMillans to appeal, and therefore, their appeal of the Morgan County Council's May 17, 2005, decision on June 16, 2005, was untimely. Under the appropriate standard of review, however, Wilkinson must establish not only that his is the *correct* interpretation of that statute, but that it is the only defensible definition that the Morgan County Board of Appeals could apply. The plain language of the statute, the Legislature's subsequent amendment of the statute, and the evidence before the Board all militate against that conclusion.

A. THE BOARD'S DECISION IS ENTITLED TO DEFERENCE AS THE ENTITY CHARGED AND EMPOWERED WITH APPLYING THE STATUTE.

As previously noted, when a district court's review of an agency decision is appealed (including, specifically, the land use decision of a county agency), the appellate court acts as if it is directly reviewing the agency decision. *Carrier*, 2004 UT 98 at ¶ 17. That review is *not* a pure "correctness" review, but rather accords the agency's decision with "some level of non-binding deference." *Id.* at ¶ 28. The Board's decision is certainly entitled to that deference.

The subject statute is part of the County Land Use, Development and Management Act, Utah Code § 17-27a-101 *et seq.* (“CLUDMA”). CLUDMA empowers the County to enact the “ordinances, resolutions, and rules” for its land use decisions, including the appeal of those decisions the County’s “Appeal authority.” *See* Utah Code § 17-27a-102(1)(b).

The Board is a quasi-judicial body, required by statute and established by ordinance to decide appeals of county land use decisions. *See* Utah Code § 17-27a-701(a); Morgan County Land Use Management Code § 16-06-240. As such, it necessarily has jurisdiction to determine its jurisdiction, as any judicial entity must. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 31 (1982). In this matter, that entailed the interpretation and application of Utah Code § 17-27a-704 (2005).

B. THE PLAIN LANGUAGE OF THE STATUTE INDICATES THAT IT SET NO LIMITATIONS PERIOD FOR AN APPEAL IN THE ABSENCE OF A COUNTY ORDINANCE THEREON.

In statutory interpretation, the “primary goal . . . is to evince the true intent and purpose of the Legislature . . . by first looking to the statute’s plain language, and giving effect to the plain language unless the language is ambiguous. In conducting this plain meaning analysis, we read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.” *Li v. Enterprise Rent-A-Car Co.*, 2006 UT 80, ¶ 9, 150 P.3d 471 (internal quotation marks, alterations and footnotes omitted).

The legislative intent as determined by the plain language of Utah Code § 17-27a-704 (2005) is quite clear: it is a directive to the counties to establish, by ordinance, a

“reasonable time” to appeal land use decisions to their respective “appeal authority.” *See* Utah Code § 17-27a-704(1) (2005). The obvious purpose of the second subsection is to clarify and constrain the counties’ responsibilities in doing so: the counties cannot allow less than ten days, and if the counties flout the statutory directive, an appellee will have “at a minimum” ten days – and no *maximum* limit to an appeal is set. *See* Utah Code § 17-27a-704(2) (2005).

That is how the Board interpreted and applied the statute: it set a minimum time for appeal but, in the absence of a county ordinance, no maximum. *See* R. 134 (conclusion 42). That conclusion was buttressed by Morgan County’s long-standing practice (in the absence of an ordinance) of advising parties they had thirty days to make such appeals. *See* R. 616 (transcript at 137:5-138:23).

Such an interpretation has the further salutary effect of encouraging counties to comply with the statutory mandate to enact an ordinance setting the time for appeal. Indeed, Wilkinson – and the County, before him – seeks nothing so much as to exploit the County’s *delay* in complying with that mandate.³

Moreover, as the Court should presume that each term of a statute is used advisedly, the use of certain language in one part of an act and the omission of the same language in another part must be given great weight in interpreting the significance of

³ In this context, the Court should not lose sight of the fact that the County consistently aligned itself with Wilkinson, below, and both before the Board and before the District Court, the County was the first, and chief, proponent of the argument that it and Wilkinson should be rewarded for the County’s delay in passing an ordinance by the dismissal of the McMillans’ appeal. *See, e.g.,* R. 613-17 (transcript at 128:21-141:24); R1-6 (*Morgan County*); R. 23-28 (*Morgan County*).

that omission. *See Carrier*, 2004 UT 98 at ¶ 35. Wilkinson contends that § 17-27a-704(2) (2005) set a 10-day limitations period for the McMillans to appeal, but the Utah Legislature has abundantly demonstrated its ability to clearly draft a statute of limitations, both within the CLUDMA and elsewhere.

In the very next part of CLUDMA, the Legislature explicitly set a 30-day limitations period to appeal decisions to the District Court: “Any person adversely affected . . . may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.” Utah Code § 17-27a-801(2)(a). The Legislature used the same language in a parallel provision, passed as part of the same senate bill, pertaining to city land-use decisions. *See* Utah Code § 10-9a-801(2)(a).

Throughout Chapter 12 of the Judicial Code, the Legislature displays its puissance in drafting limitations periods:

- “An action may be brought within eight years upon a judgment or decree”
- “An action may be brought within four years . . . upon a contract”
- “An action may be brought within three years . . . for waste”

Utah Code §§ 78-12-22, -25, -26.

Utah Code § 17-27a-704(2) (2005) is notable for the fact that it fails to follow the language of any of these examples. The necessary conclusion is that subsection (2) is not, and was not intended to be, a limitations period.

C. SUBSEQUENT AMENDMENT OF UTAH CODE § 17-27a-704 SUPPORTS THE BOARD’S DISCRETIONARY INTERPRETATION OF THE ORIGINAL STATUTE.

A further example of the principle – that language in a statute is used advisedly, and that the failure to use different language is strong evidence against the interpretation such language would support – is provided by the Legislature’s subsequent amendment of the statute.

In the 2006 Legislative Session, Utah Code § 17-27a-704 was amended to language more amenable to Wilkinson’s argument:

- (1) The county shall enact an ordinance establishing a reasonable time of not less than ten days to appeal to an appeal authority a written decision issued by a land use authority.
- (2) In the absence of an ordinance establishing a reasonable time to appeal, an adversely affected party shall have ten calendar days to appeal to an appeal authority a written decision issued by a land use authority.

Notably, the Legislature eliminated the modifier “at a minimum” from subsection (2). This change only highlights the Legislature’s presumptively “advised” use of that modifier in the version in force at the time of the McMillans’ appeal. Yet again, the Legislature demonstrates that it *could* have phrased the 2005 version differently but chose not to.

D. MORGAN COUNTY’S EXISTING PRACTICE OF WHAT CONSTITUTED A “REASONABLE TIME” TO APPEAL INFORMED THE BOARD’S DECISION.

The Morgan County Board of Appeals did not interpret and apply Utah Code § 17-27a-704 (2005) in a vacuum. The record demonstrates that the Board expressly considered several items of evidence in concluding that the McMillans filed their appeal

within a “reasonable time,” as required by the statute. That evidence included the time period subsequently set by the County, by ordinance, in compliance with Utah Code § 17-27a-704(1) (2005), providing 30 days for an appeal. R. 614 (transcript at 129:14-16). It also included a survey of 24 other jurisdictions (presumably other counties or municipalities), the vast majority of which allowed more than the mere 10 days advocated by Wilkinson. R. 615 (transcript at 133:13-21).

The Board also considered the County’s historical practice, even in the absence of an ordinance, both of advising applicants that they had 30 days to appeal and of accepting appeals filed within that time frame. R. 616 (transcript at 137:5-138:23). Indeed, in context, the County’s subsequent ordinance was no more than the belated codification of this practice.

Finally, the Board had before it the unique position of the McMillans’ appeal. The County sought to dismiss the McMillans’ appeal on the basis of the County’s own delay in passing the ordinance required by Utah Code § 17-27a-704(1) (2005). R. 615 (transcript at 134:25-135:5). The McMillans’ appeal was the *only* appeal in the narrow window between the effective date of Utah Code § 17-27a-704 (2005) on May 2, 2005, and the passage of the county ordinance sometime in August 2005. *Id.* In the context of the County’s past practice, the statutory mandate, and the County’s subsequent ordinance, that tack by the County, and now by Wilkinson, was clearly nothing more than opportunism of the poorest sort. The Board implicitly rejected such an approach to statutory interpretation, as should this Court.

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the Morgan County Board of Appeals and of the District Court.

REQUEST FOR HEARING

The McMillans respectfully request a hearing on this matter.

DATED this 14 day of March, 2007.

KIRTON & McCONKIE

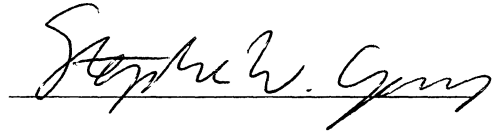
By: Stephen W. Geary
BENSON L. HATHAWAY, JR.
STEPHEN W. GEARY
Attorneys for Respondents/ Appellees
Michael and Ann McMillan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of March, 2007, I caused to be served two copies of the foregoing **BRIEF OF APPELLEES MICHAEL AND ANN McMILLAN**, by the method indicated below, to the following:

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M. Darrin Hammond
SMITH KNOWLES, P.C.
4723 Harrison, Suite 200
Ogden, Utah 84403



ADDENDUM
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Tab A

THE MORGAN COUNTY, UTAH BOARD OF APPEALS

**In re COVENTRY COVE
SUBDIVISION**

**FINDING OF FACTS AND
CONCLUSIONS OF LAW**

The Morgan County Board of Appeals met on November 10, 2005. Present was Appellant Michael McMillan with Counsel Benson Hathaway; Coventry Cove LLC with Counsel M. Darin Hammond; and Morgan County represented by County Attorney Kelly Wright. Also present was the Morgan County Planner, Sherrie Christensen and County Engineer Austin Rowser. The Board took testimony, evidence and considered arguments. The following findings of fact and conclusions of law are based on the pleadings, testimony, evidence and record of proceedings from the County Council and Planning Commission including Coventry Cove submissions to the County Planner and Engineer.

FINDINGS OF FACT

1. Coventry Cove is a subdivision located in Morgan County, Utah fronting on Old Highway, on the south east edge of the Mountain Green area.
2. Rex Wilkinson is a principal of Coventry Cove, LLC, who is developing the Country Cove subdivision.
3. Coventry Cove subdivision received final approval on May 17, 2005 from the Morgan County Council.
4. The development agreement was signed on May 18, 2005.
5. Michael and Ann McMillan live directly across Old Highway and downstream from the Coventry Cove subdivision.

6. The McMillans filed their appeal on June 16, 2005.
7. By stipulation of the parties the hearing was continued to accommodate some of the parties and the Board members.
8. The McMillan appeal was filed without the fee for the appeal. McMillan was notified that a fee was required by a letter from County Attorney Wright dated July 11, 2005 and McMillan sent the fee on July 15, 2005; Morgan County Treasurer receipted payment on July 20, 2005.
9. Morgan County operates its planning and zoning under its Land Use Management Code ("LUMC"). Also relevant is the Overlay Zone, Chapter 35 of the LUMC, which was repealed November 1, 2005.
10. Michael McMillan testified that his property had been flooded in the past (1984 and two additional times) from water coming from the Wilkinson dam and across Coventry Cove. McMillan testified that the dam was considered high risk by the Army Corp of Engineers and the State of Utah Water Resources Board. There is a 60 inch pipe feeding the dam, and only a 24 inch outflow. In high water years there is a substantial risk of flooding.
11. McMillan testified that he was not adversely affected by an increased flooding risk from Coventry Cove itself. However, future flooding would intersect with the storage buildings, which are being built in the path of the former flooding, which could impact his property.
12. McMillan further testified that he was adversely affected because he is located across the street from Coventry Cove and stated that his property values would be affected by Coventry Cove, that his view of Coventry Cove was unpleasant; that

the high density development would devalue his property; and that his property taxes would increase because of the negative fiscal impact.

13. RexWilkinson testified that there has been commercial construction activity on the parcel since the 1940s. Rex's father conducted an excavation business for many years, using a large portion of the property for his equipment. At some point a shop was established in the side of a hill - about 1971. Rex testified that the shop was used for various aspects related to construction for many years. Rex stated that he purchased the shop " a couple of years ago" and that it has been used since then for maintenance of Wilkinson Water Company.
14. There is no record of a building permit for the shop, although at the time it was constructed a permit was required.
15. There is no record of a business license or a permit (including a conditional use permit which was required) for any business associated with the Coventry Cove property up to the time of the Coventry Cove application.
16. A building described as the "Shop" was built in 1971. There is no record of a building permit on file with Morgan County.
17. Rex testified that he was absent for a period of about 4 years, 1972-76. He was not able to testify about the use of the property during that time.
18. Rex also testified that the initial use was for excavation, although there was work performed on well houses and irrigation systems. While the dairy was in operation on the property, the shop was used for dairy support. The dairy discontinued its operations around 2001---Since then shop was used only for maintenance of the Wilkinson Water District (although the office of the District

was in the Wayne Wilkinson home.

19. Wilkinson wants to use the shop at Coventry Cove for a construction and design office. He has recently remodeled the interior adding offices and a rest room, plus a new exterior. There were no offices nor a rest room in the old building.
20. Blair Larson testified that the property was used for Harry Wilkinson's excavation business. He also stated that the use of the property changed about the time the Shop was built.
21. The Coventry Cove plat shows an area for expansion of the Shop.
22. Coventry Cove is comprised of two zones: 4.24 acres in RR-1 (one acre lots) which qualifies for 3.94 base density dwelling units after unbuildable slope application, and 5.6 acres in R1-20 (20,000 sq. ft. lots) which qualifies for 10.69 base density dwelling units after unbuildable slope area is deducted.
23. The County did not deduct area for unbuildable stream area as required by the LUMC.
24. Sensitive areas are at risk areas or 'sensitive' based on the previous flooding and other hazards. Because of the 1984 and other year floods, and the proximity of the Wilkinson Dam to Coventry Cove, the project is in a sensitive area pursuant to the LUMC 16-28-040(2), which defines areas subject to flooding as sensitive areas when no map has been adopted. The Council is required to preserve the sensitive areas in open space, without buildings. The County Council did not make any such considerations or deductions.
25. In order to obtain the density for Coventry Cove, there was a transfer of development rights from the RR-1 zone to the R1-20 zone, where 18 homes were

to be built.

26. The LUMC Overlay Zone 16-35-030-2(a) states that “in R (RR1) residential zone districts, permitted and conditional uses identified in the Neighborhood Commercial (C-N) District may be allowed, ---“ provided they comply with LUMC 16-35-030-2 which requires that they be “recommended by the Planning Commission and approved by the County Council based on specific findings, citing to plan provisions, that the residential or commercial mixed use is consistent with the County General Plan goals, policies and objectives, the policies and code provisions for the PUDs and is in harmony with the community character.”
27. Morgan County does not have a Transfer of Development Rights (“TDR”) ordinance between properties or between zones on a single property. Nor does it have any defined legal mechanism for transferring development from one zone to another zone on a single property owned by the same entity. The County permitted Coventry Cove to transfer virtually all of the density unit rights from the RR-1 zoned section to the R1-20 zoned section.
28. The LUMC Overlay Zone permits additional density based on certain factors set forth in the Overlay Zone 16-35-040. Bonus Density is calculated based on a formula in the Overlay Zone.
29. Part of the justification for bonus density under the Overlay Zone was that Coventry Cove would provide affordable housing.
30. Bonus density increase of up to 15% is allowed for Public Trails – pursuant to then General Plan chapter 5, 4.1 & 4.1.1 at pg 32 and reference 16-35-040

footnote 6, the county granted an additional 3%. However, Coventry Cove only provided a required sidewalk adjacent to Old Highway, not a trail.

31. Open space may only be counted for unrestricted space, i.e. buildable, dedicated parks, etc. The Overlay Zone grants additional bonus of up to 15% for Extra Usable Open space, from which the County Council granted a bonus of 2% for Coventry Cove. Coventry provides the following total open space: Parcel A=0.03 acre; Parcel B = 0.17 acre; Parcel C = 3.13 acre for a total of 3.33 acres. 3.33 acre divided by the 9.84 acres of Coventry Cove yields 34% open space. The LUMC requires 40% minimum open space. The Mountain Green area plan in force at the time of this application required 60% open space.
32. Additional density of up to 20% may be granted for Affordable Housing, the County Council granted an extra 15% to Coventry Cove. The Morgan County General Plan requires guarantees by deed restriction or other comparable means that the housing will remain affordable. No such guarantees were provided in the Coventry Cove Development Agreement.
33. Additional density of up to 10% may be granted for a Mixture of Housing Types, the County Council granted an additional 7%. However in Coventry Cove all of the homes are single family. In footnote 15, chapter 9 General Plan section 1.1.3 defines “types” as single family, town homes and manufactured housing.
34. The Overlay Zone allows for additional density of up to 10% for Superior Cluster Design (See footnote 16). The County Council granted an additional 5%. Coventry Cove has a single cluster of homes on basically zero lot lines located in a corner of the nearly ten acres, with the remainder of the property being used for

storage areas and a future bed and breakfast. The County Council granted 5% bonus density for this.

35. Additional density up to 10% may be granted for Superior Architectural Design.

The County Council granted a 5% bonus. Coventry Cove has established an attractive mix of architectural designs.

36. The application process is described in LUMC 16-35-050, which requires that a detailed narrative supporting the proposed project based on General Plan be submitted with the application. The narrative must reflect principles which cite to specific General Plan sections, goals, objectives and policies, under a PUD concept application as provided under LUMC 16-08-030. Coventry Cove did not provide such narrative.

37. Coventry Cove provided a fiscal analysis of the development as required. The analysis was obtained from an independent firm, hired by Coventry Cove. That analysis showed that the development would have a slightly positive impact for the County and a negative impact for the Morgan County School District.

38. The LUMC 16-020-050 requires a Bed & Breakfast to have 200 frontage feet along a County Road. The Coventry Cove Bed & Breakfast does not have any frontage along Old Highway, nor any other County Road.

39. During the approval process several agendas were advertised improperly, including the Planning Commission agenda for August 19, 2004 and the County Council Agenda for September 12, 2004 which incorrectly listed lot sizes as 1/8 acre; and the May 5, 2005 Planning Commission and the County Council final plat agendas which did not specify lot sizes .

40. The notification of the public hearing by the Planning Commission meeting on May 6, 2005 for Coventry Cove listed an application for a zone change and identified the zone change as from A-20 to RR-1. In that meeting the Planning Commission recommended a change of zone from A-20 to R1-20 without notice to the public.
41. Pursuant to LUMC 16-35-030(1) the County Council was required to establish specific reasons that Coventry Cove was in compliance with the LUMC, General Plan and Mountain Green Area Plan. The County did not cite with specificity how Coventry Cove was in conformance with the LUMC.

CONCLUSIONS OF LAW

42. Utah Code 17-27a-704 established the time for appeal. Morgan County did not have at the time of the passage of this statute a clear time period by which an appeal must be filed. Subparagraph 2 of this statute reads “In the absence of such an ordinance and at a minimum, an adversely affected party shall have ten calendar days to appeal.” This Board interprets “at a minimum” to mean “at least.” Therefore the McMillan appeal was timely.
43. The failure of McMillan to pay the appeal fee with the application is harmless error. There is no language in the LUMC which requires the fee to be paid at the time of the appeal. Because McMillan paid the fee within a reasonable period of being notified there is no error which defeats the right to appeal.
44. The Board has subject matter jurisdiction, pursuant to the LUMC 16-06-230-1b, 16-06-240-1., 16-06-240-3 and specifically 16-06-240-6 to review the

administrative decisions of the County Council. Administrative decisions include the application of the LUMC to applicants such as Coventry Cove.

45. The Overlay Zone is a part of the LUMC and the Board has jurisdiction over the application of the Overlay Zone to Coventry Cove inasmuch as the application is an administrative decision, and is not legislative. This Board has power to review the application of the 'bonus density' as an administrative decision.
46. The McMillans have standing to appeal because they are adversely affected pursuant to their testimony above, arising out of the actions of County Council in approving Coventry Cove.
47. The McMillans stated a claim upon which relief can be granted. This Board has power to review the items of which McMillan complained and has power to adjudicate these items accordingly.
48. The Coventry Cove final approval including the development agreement that was signed on May 18, 2005, and all proceedings that led up to it, are subject to review by the Board of Appeals and the pending appeal. Reference LUMC 16-35-05-6,7,8
49. In order for a legal nonconforming ("grandfathered") use to be included in a PUD/Overlay Zone there must have been a building permit for the shop and a conditional use permit. The use must have been continuous. An interruption in the use terminates the grandfathered status. Because of the lack of continuous legal nonconforming uses since 1971, the Shop is not grandfathered.
50. The Shop at Coventry Cove is not a legal use. There was never a building permit, nor conditional use permit issued for the shop. (UCA 17-27a-510(2)(a))

Only a legal nonconforming use can be continued under LUMC and Overlay Zone (LUMC 16-35-030 et seq.)). Furthermore, there has been a change in uses from a dairy support facility to water district maintenance (a public facility classification, LUMC 16-20-030(16)). Under the Coventry Cove plan the shop would become a construction and design facility. The shop was recently remodeled with offices and a rest room, and a new exterior. No offices existed before now.

51. A legal nonconforming use cannot be expanded, nor can it be included if it violates the LUMC (See UCA 17-27a-510; LUMC 16-04-705; 710, 16-020-360(6)a,(3)a,(3)).
52. Morgan County does not have a transfer of development rights (TDR) ordinance, and there is no legal basis to transfer development rights between zones, even in a PUD-Overlay Zone such as Coventry Cove.
53. Coventry Cove transferred virtually all of the RR1 density units to the R1-20 zone, thereby giving up all additional development rights in the RR1 zone. Regardless of the method of transfer, the total number and kind of uses cannot exceed the underlying zoning allowances without bonus densities being given by the PUD Overlay. In this case where all the density units were transferred out of the RR-1 zone, the bonus densities given were applied to the R1-20 development and should apply only to the R1-20 zone. Therefore the commercial storage units and the bed and breakfast uses should not have been allowed since there are no development rights remaining in the RR-1 zone. The transfer of development rights was an abuse of discretion by the County Council.

54. Neither the final approval nor the Development Agreement contain limitation of the “future use and sale of housing units” to preserve the affordability. (Morgan County General Plan 1.3.1) It was error for the County Council to approve Coventry Cove without including such limitations.
55. Coventry Cove is comprised of two zones: 4.24 acres of RR-1 (one acre lots) which qualifies for 3.94 base density dwelling units after unbuildable slope application; and. 5.64 acres of R1-20 (20,000 sq. ft. lots) which qualifies for 10.69 base density units after unbuildable slope application. This should be the base density units for Coventry Cove before other restrictions outlined below.
56. Sensitive areas are at risk areas or ‘sensitive’ based on the previous flooding and other hazards. Because of the 1984 and other year floods, and the proximity of the Wilkinson Dam to Coventry Cove, the project is in a sensitive area pursuant to the LUMC 16-28-040(2).
57. The County Council erred when it calculated base density by failing to take into account and deduct the unbuildable area of the stream and the requirements of the Sensitive Area ordinance.
58. The County Council erred in giving Coventry Cove bonus density for Trails, when the only ‘trail’ is a required sidewalk adjacent to Old Highway Road. A sidewalk is not a trail for bonus density purposes.
59. The Overlay Zone grants additional bonus for Extra Usable Open space. Coventry provides the following total open space: Parcel A=0.03 acre; Parcel B = 0.17 acre; Parcel C = 3.13 acre for a total of 3.33 acres. 3.33 acre divided by the 9.84 acres of Coventry Cove yields 34% open space. The LUMC requires 40%

minimum usable open space. The Mountain Green area plan in force at the time of this application required 60% usable open space. The County Council erred in approving Coventry Cove as designed with too little open space, and further erred in granting additional bonus density for extra open space.

60. Additional density is granted for Affordable Housing. The LUMC requires guarantees that the housing will remain affordable. No guarantees were provided in the Development Agreement. Alternatives exist that the County Council could have used. The County Council erred in granting additional bonus for affordable housing without instituting guarantees.
61. Additional density is granted for a Mixture of Housing Types. However all of the homes are single family. In footnote 15, chapter 9 General Plan section 1.1.3 defines “types” as single family, town homes and manufactured housing. Because there is not a mixture of “types” the additional bonus density is not warranted.
62. The Overlay Zone gives additional density for Superior Cluster Design (See footnote 16). Coventry Cove has a single cluster of homes of zero lot lines in a corner of the nearly ten acres, with the remainder of the property being used for storage areas and a future bed and breakfast. There is no evidence which supports that the design of the clustered homes is superior according to the code.
63. Additional density is granted for Superior Architectural Design. Coventry Cove has established an attractive mix of architectural designs. The bonus for Superior Architectural Design is appropriate for a bonus density as granted.
64. The application process is described in LUMC 16-35-050, which requires that a

detailed narrative supporting the proposed project based on General Plan be submitted with the application. The narrative must reflect principles which cite to specific General Plan sections, goals, objectives and policies, under a PUD concept application as provided under LUMC 16-08-030. Coventry Cove did not provide such narrative. The County should not have processed Coventry Cove without obtaining the required narrative and confirming its conformance with the General Plan.

65. Coventry Cove provided a fiscal analysis of the development as required. The analysis was obtained from an independent firm, Wikstrom, hired by Coventry Cove. That analysis showed that the development would have a slightly positive impact for the County and a negative impact for the Morgan County School District. Because the LUMC does not establish guidelines of what conclusions should be drawn from such an analysis, the County Council did not abuse its discretion in accepting the fiscal analysis.
66. Coventry Cove is a high density development because of the bonus density granted, see Section 4.1.1 of the Mountain Green Area Plan. High density projects should be limited to the Town Center. Coventry Cove is not in the Town Center of Mountain Green. It was improper to consider a high density development outside the Town Center.
67. The LUMC 16-020-050 requires a Bed & Breakfast to have frontage along a County Road. The Coventry Cove Bed & Breakfast does not have frontage along Old Highway, or any other County Road. The Bed & Breakfast should not have been approved without requiring it to have frontage along a County road.

68. During the approval process several agendas for the notification for Coventry Cove listed lot sizes as 1/8 acre instead of the factually correct size of 1/16 an acre, more or less. This repeated error was misleading to the public. A citizen may have been comfortable of an 1/8 acre lot, but may have opposed the substantially smaller lot sizes. These notifications were erroneous.
69. The notification process for the Planning Commission May 6, 2004 meeting for Coventry Cove listed an application for a zone change and identified the zone change as from A-20 to RR-1. In this meeting the Planning Commission approved a change of zone from A-20 to R1-20 which has twice as much density without notice to the public. The Planning Commission erred in recommending the zone change to a zone which had not been advertised.
70. Pursuant to LUMC 16-35-030(1) the County Council was required to establish specific reasons that Coventry Cove was in compliance with the LUMC, General Plan and Mountain Green Area Plan. The County did not cite how Coventry Cove was in conformance with any of these Plans with specificity. The County Council erred in not requiring providing the proper specific reasons Coventry Cove was in compliance.

Dated

Alvin R. Lundgren
Chairman Morgan County Board of Appeals

Tab B

THE MORGAN COUNTY, UTAH BOARD OF APPEALS

**In re COVENTRY COVE
SUBDIVISION**

ORDER

The Morgan County Board of Appeals met on November 10, 2005. Present was Appellant Michael McMillan with Counsel Benson Hathaway; Coventry Cove LLC with Counsel M. Darin Hammond; and Morgan County represented by County Attorney Kelly Wright. Also present was the Morgan County Planner, Sherrie Christensen and County Engineer Austin Rowser. The Board took testimony, evidence and considered arguments. The Board has entered its findings of fact and conclusions of law.

It is the opinion of this Board that the Planning Commission and County Council repeatedly failed to follow its own ordinances, policies and requirements. It is also the opinion of this Board that the Wilkinsons were induced to follow recommendations which they followed in good faith. While the LUMC, General Plan and Mountain Green Area Plan provide the information through which the Wilkinsons must follow for approval, it is clear that the Wilkinsons were following instructions from the County. Had the County properly and timely reviewed its own ordinances, the Wilkinsons have should have been able to meet the requirements set forth in the LUMC. Unfortunately, the Wilkinsons bear the consequences for the failure of the County to follow their own requirements.

The McMillan's appeal is granted in that the Coventry Cove subdivision project final approval and development agreement is rescinded and remanded to the County

Council to address and correct the deficiencies noted in and in conformance with the Findings of Fact and Conclusions of Law and in relation to the Morgan County General Plan, the Mountain Green Area Plan, and the Morgan County Land Use Management Code---and to conduct a careful review of the entire process. Because Coventry Cove has commenced construction and development, the Morgan County Building Inspector is ordered to issue a stop order for existing building permits, cease issuing further building permits, and enjoin further development of Coventry Cove until after the County Council has readdressed and corrected the deficiencies noted in the Findings of Fact and Conclusions of Law, and has approved a new development plan and agreement in accordance with the Morgan County General Plan, Mountain Green Area Plan, and the Morgan County LUMC.

IT IS SO ORDERED

Dated: 11/23/05



Alvin R. Lundgren
Chairman, Morgan County Board of Appeals

Tab C

CONDENSED TRANSCRIPT
BEFORE THE BOARD OF APPEALS

Board of Appeals:

Chairman Al Lundgren

Vice-Chairman John Mullen

Don McClellan

Chris VanCampen

Doug Brown

County Planner- Sherrie Christensen

County Engineer- Austin Rowser

COVENTRY COVE PUD HEARING

MORGAN COUNTY COURTHOUSE, ROOM 4

MORGAN CITY, UTAH 84050

7:00 p.m.



CitiCourt, LLC
THE REPORTING GROUP

00581

170 South Main Street, Suite 300
Salt Lake City, Utah 84101

Coventry Cove PUD Hearing
November 10, 2005

SHEET 1

BEFORE THE BOARD OF APPEALS

Board of Appeals:

Chairman Al Lundgren
Vice-Chairman John Mullen
Don McClellan
Chris VanCampen
Doug Brown

County Planner- Sherrie Christensen
County Engineer- Austin Rowser

COVENTRY COVE PUD HEARING
MORGAN COUNTY COURTHOUSE, ROOM 4
MORGAN CITY, UTAH 84050
7:00 p.m.

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A P P E A R A N C E S	
2	FOR COVENTRY COVE, LLC AND REX WILKINSON:
3	M. Darin Hammond
4	SMITH KNOWLES, P.C.
5	Attorneys at Law
6	4723 Harrison Boulevard, Suite 200
	Ogden, Utah 84403
	(801) 476-0303
	(801) 476-0399
7	FOR APPELANTS MICHAEL AND ANN MCMILLAN:
8	Benson L. Hathaway, Jr.
9	Stephen C. Geary
10	Attorneys at Law
11	1800 Eagle Gate Tower
12	60 East South Temple
	Salt Lake City, Utah 84145-0120
	(801) 328-3600
	(801) 321-4893
13	FOR MORGAN COUNTY AND MORGAN COUNTY COUNCIL:
14	Kelly W. Wright
15	Morgan County Attorney
16	Attorney at Law
	P.O. Box 886
	Morgan, Utah 84050
	(801) 845-4006
	(801) 845-6006

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1 PROCEEDINGS

2
3 CHAIRMAN LUNDGREN: Well, I think it's
4 gotten close to the time that we ought to begin. I
5 would first ask the attorneys here and the parties if
6 there's anybody who is not here, whom they expect to
7 be here. Do we have everybody here in attendance?

8 MR. HATHAWAY: Yes.

9 MR. HAMMOND: Yes.

0 CHAIRMAN LUNDGREN: Okay. Ladies and
1 gentlemen, thank you for coming. This is the time
2 that has been advertised and set for the Board of
3 Appeal's hearing on the Coventry Cove Subdivision.

4 I've got a few administrative things that
5 I would like to bring up before we actually get into
6 the issues at hand tonight. I would first ask
7 members of the Board if there are any issues that
8 they wish to bring up regarding any administrative
9 issues.

MR. VANCAMPEN: No.

CHAIRMAN LUNDGREN: Okay. I would like to
bring up one issue. I noticed that in the Morgan
County News, that today's hearing was advertised in
the November 4th paper, but it was dated December 4th
as the date of publication on the document. I would

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simply like to make a note in the record that it was
in the November 4, 2005 issue of the Morgan County
News, notwithstanding the typographical error.

A little bit of just general business
before we go tonight. This is a complex issue, or
issues, that we're going to be talking about. And in
order to make this proceeding go as quickly as can
reasonably be possible, yet have everybody have a
proper opportunity to express their views and
positions, I'm going to request that everybody go the
extra mile to extend a proper courtesy.

You will be given a chance to air your
views and your opinions and your thoughts, so we have
no restraints on time as far as that goes. I expect,
and the Board members expect, candor and honesty
about the issues and facts. That makes our job a lot
easier. And if you've got a weak point, we want to
talk about it because I'm sure if you don't raise it,
someone else will.

Lawyers are word merchants and they have a
tendency to repeat themselves from time to time. I
will cut off lengthy repetitive arguments. If we've
heard it once or twice, that's probably sufficient.

Regarding the issues, I'm going to request
you to make it as clear as possible what your issue

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1 is. Members of this Board are made up of people with
2 legal experience and those without direct legal
3 experience. The better we understand what you're
4 trying to explain, the more efficiently and
5 effectively we can do our duty.

6 We are here tonight to decide whether or
7 not the County Council abused its discretion
8 regarding the approval of Coventry Cove. This is not
9 about the personalities involved. This is about
10 whether the County ordinances were properly followed.
11 We do not want to make this an issue about
12 personalities. It is not an issue about
13 personalities. This is an issue of law and fact and
14 we want to concentrate on that.

15 We certainly acknowledge the work and the
16 investments made by Rex Wilkinson and his family in
17 their development. I know they spent an awful lot of
18 time and an awful lot of money of getting to this
19 point. And tonight it would be our goal that we can
20 cover these issues as clearly as possible. And
21 hopefully by the end of this evening we'll come to at
22 least a mutual agreement on critical core issues,
23 that we know what recourse Mr. Wilkinson will need to
24 take to continue with his project.

25 Secondly, the agenda that was published in

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1 the Morgan County Public News sets a list of items of
2 how they're to proceed. The Land Use Code grants the
3 petitioner the right to proceed first unless, by
4 agreement of the parties and by this Board, a change
5 is made.

6 Mr. Wright, the County Attorney has raised
7 a number of jurisdictional issues. Jurisdictional
8 issues decide whether or not we can go ahead with
9 everything else we can talk about tonight. I would
10 like to get input, first of all, from those here as
11 to their position on changing the order, so we can go
12 out of order and talk about these jurisdictional
13 issues.

14 So I'm going to first ask those present to
15 stand and identify themselves, and then after
16 everybody has been identified, go back and discuss
17 whether or not we can go out of order from the way
18 this agenda was published in the paper.

19 Mr. McMillan, I'll have your attorneys go
20 first.

21 MR. HATHAWAY: Yes, Mr. Chair. I'm Mike
22 Hathaway. I represent Mike and Ann McMillan, and I'm
23 joined at the table by Steve Geary, who is my
24 partner.

25 MR. HAMMOND: Darin Hammond, I'm

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Coventry Cove PUD Hearing
November 10, 2005

SHEET 2

1 representing Rex Wilkinson and Coventry Cove, LLC.
2 MR. WRIGHT: Kelly Wright, on behalf of
3 Morgan County and the Morgan County Council with the
4 decision. I think you asked further whether there
5 was an issue about going outside of the way the
6 agenda was published.
7 CHAIRMAN LUNDGREN: That is correct.
8 MR. WRIGHT: Okay. I don't have a
9 problem. I think jurisdictional issues probably
10 ought to be raised and discussed up front. This body
11 is a quasi judicial, so it technically does not fall
12 within the scope of the Open Meetings Act; which is
13 legislative and executive. But I have no objections.
14 CHAIRMAN LUNDGREN: Mr. Hammond?
15 MR. HAMMOND: I have no objections. It
16 seems that it would be proper for the Appellant to
17 discuss their position regarding the jurisdictional
18 issues first, if we want to try and follow the agenda
19 as closely as possible. But I do think the
20 jurisdictional issues should be addressed first.
21 CHAIRMAN LUNDGREN: Thank you. And, Mr.
22 Hathaway?
23 MR. HATHAWAY: Frankly, with respect to
24 the order, after reviewing the Appellate Rules and
25 specifically the provision you had pointed out, I had

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1 agenda as published.
2 MR. MULLEN: I second it.
3 CHAIRMAN LUNDGREN: I call for a vote.
4 All in favor?
5 MR. MULLEN: Aye.
6 CHAIRMAN LUNDGREN: All opposed? Okay.
7 We'll follow the published agenda.
8 Mr. Hathaway, you may begin.
9 MR. HATHAWAY: May I request one
10 additional clarification? The notice that we
11 received said each side would have 30 minutes. If I
12 understand Mr. Chair correctly, you would like to
13 provide us all the opportunity to say what we need to
14 say within the limitations of the prolixity lawyers
15 sometimes fall into, and so I would just like to know
16 how to schedule my time.
17 CHAIRMAN LUNDGREN: I think the 30
18 minutes, correct me members of the Board if I
19 misunderstand, but I think the 30 minutes is a
20 guideline. I don't believe that we're going to
21 adhere to that with great rigidity, but we don't want
22 to be here all night unnecessarily. But on the other
23 hand, we want to cover all of these issues. So we
24 want this to be a fair and complete hearing, but if
25 we can keep within those guidelines, we will still

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1 considered going forward first, trying to sustain the
2 burden that we had, allowing them, the County and the
3 Coventry Cove folks, to respond and to bring up what
4 arguments they had with respect to jurisdiction. And
5 then my intention was to reserve some time from that
6 allotted to reply. And so that's sort of how we
7 planned to do it; and quite frankly, that's how we
8 prefer to do it.

9 CHAIRMAN LUNDGREN: Members of the Board?
10 MR. VANCAMPEN: I would certainly suggest
11 that we deal with the jurisdictional issues first.
12 And since there is an actual motion from Mr. Wright,
13 I think that perhaps they ought to start with that
14 and then go from there.

15 MR. MULLEN: I would disagree only because
16 the Code indicates that the Appellants should have
17 the right first to present this case. And because
18 part of the case of the County has to deal with
19 jurisdictional issues, that should be raised when
20 their time comes.

21 MR. MCCLELLAN: I see no reason not to
22 stick with the published agenda.

23 CHAIRMAN LUNDGREN: Do we have a motion?

24 MR. VANCAMPEN: No, sir.

25 MR. MCCLELLAN: I move that we follow the

10

1 have a long evening here.

2 MR. HATHAWAY: I plan to go with the 30.
3 We will move with this batch, but thank you for the
4 opportunity to address all of the matters.

5 CHAIRMAN LUNDGREN: May I make one comment
6 before you begin, Mr. Hathaway?

7 MR. HATHAWAY: Yes.

8 CHAIRMAN LUNDGREN: Simply as a matter of
9 clarification for everybody here, the nature of this
10 hearing allows members of this Board to ask questions
11 of those who are making presentations, including
12 those who are witnesses. And much to Mr. Hathaway's
13 dismay, we may interrupt your presentation for
14 further clarification. I assume you have no
15 objection to that.

16 MR. HATHAWAY: No objection. I welcome
17 it. Thank you.

18 Mr. Chair, Mr. Vice Chair, and members of
19 the panel, I appreciate your time and the opportunity
20 to appear here. I would like to begin immediately
21 and call Mr. Mike McMillan to the stand.

22 CHAIRMAN LUNDGREN: Before you sit down,
23 Mr. McMillan, would you raise your right hand?

24

25

12

1 MICHAEL McMILLAN,
2 called as a witness, being first duly sworn, was
3 examined and testified as follows:

4
5 MR. HATHAWAY: Now, I've got some photos
6 that I would like to show the witness. Would it be
7 all right if he stood up here, at least while he's
8 responding to my questions?

9 CHAIRMAN LUNDGREN: It would.

10
11 DIRECT EXAMINATION

12 BY MR. HATHAWAY:

13 Q. Mr. McMillan, you've identified yourself.
14 Would you tell the panel where you live?

15 A. I live at 3959 West Old Highway Road in
16 Mountain Green.

17 Q. How long have you lived there?

18 A. For 30 years. I moved there in 1975.

19 Q. Where is your property in relation to the
20 Coventry Cove?

21 A. We're separated by the County road. We're
22 the adjacent property owners.

23 Q. So if I hold up this plat, and let me
24 scoot this up here so that everybody can see it, the
25 counsel.

13

1 equipment repair. And the building is a shell
2 without insulation or a heating system, and no
3 partitions, no restrooms. That was a place to put
4 farm equipment in and work on.

5 Q. In the 30 years that you've lived on the
6 property, have you ever seen in this building, in
7 particular, a construction company?

8 A. No, I have not.

9 Q. Any type of commercial occupation?

10 A. No.

11 MR. WRIGHT: I have to object to the
12 question of the construction company because it's
13 vague and ambiguous. A company is a corporate
14 entity, and I'm not sure how you see a corporate
15 entity.

16 CHAIRMAN LUNDGREN: Mr. Hathaway, would
17 you like to address that?

18 MR. HATHAWAY: I'll try and clarify.

19 Q. (By Mr. Hathaway) Have you ever seen
20 people present at the building that appear to you,
21 based on your experience -- and by the way, what do
22 you do for work?

23 A. I'm a contractor. I'm an electrical and
24 general contractor.

25 Q. And how long have you been an electrical

15

MR. WRIGHT: Okay.

Q. (By Mr. Hathaway) I believe that this is
the May 5th reiteration of the plan that ultimately
was attached. Show us where your property lies with
respect to this.

A. Directly across from this development.
It's separated just by the road.

Q. In terms of the grading of the land, where
is yours juxtaposed to Coventry Cove?

A. We are down the stream. This development
and ours is in an ancient waterway. We're down the
stream, just across the highway from it.

Q. Do you know the Wilkinson family?

A. I do.

Q. Have you been on their property before?

A. I have.

Q. You've had occasion to see the buildings
and homes and structures that exist on the property?

A. Yes.

Q. Tell us, with respect to the building that
you understand is part of the grandfathered use, the
commercial building, have you been in that building
before?

A. I have. It's one of the three-part area
operations of Mountain Border Landing Shed and the

14

1 contractor?

2 A. Do I have to answer that? Thirty-five
3 years.

4 Q. You're under oath. Yes. Have you ever,
5 in any of your visits to the Wilkinson building that
6 you're referring to, seen people engaged in what you
7 consider to be a construction business?

8 A. No. It was always to support the farm,
9 and they always had big tractors that I'm fascinated
10 with looking at. I have seen, on one occasion, where
11 Max was welding Harry's backhoe for him and another
12 time Don and Harry were working on this undercarriage
13 on a crawler because it was stormy weather. But it
14 was very incidental to that. It was always to
15 support the dairy, and it pretty well took the full
16 time to make it work.

17 Q. In the years that you've lived on the
18 property and the Wilkinsons have owned property above
19 you, have you had flooding?

20 A. Yes, we have.

21 Q. We've got a few photos here. When was the
22 first time that you experienced flooding from the
23 Wilkinson property to yours?

24 A. I believe in 1984.

25 Q. I've got some photos here. Sorry,

16

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SHEET 3

1 Counsel, I -- they're in 1984. Maybe the easiest --
2 would it be all right, Mr. Chair, if they came up and
3 looked while Counsel is here?

4 CHAIRMAN LUNDGREN: Absolutely.

5 Q. (By Mr. Hathaway) Mike, what are those
6 of?

7 A. There's a dam, a really valuable asset to
8 the farm and to the whole area, it's just above us.
9 And this is a picture of the face of the dam in 1984.
10 And the -- it wasn't the dam's fault. It just had so
11 much runoff and we had to move from our home, and
12 that's what these photos are about. Because the
13 State believed it had a piping failure and the runoff
14 was just so great. These photos here are the
15 spillway carrying extra water that couldn't pass
16 through the pipe in the bottom. This is the dam.
17 The state marked it out here. It turned out it had
18 not penetrated.

19 Then the spillway came down past Wayne
20 Wilkinson's house, down a separate canyon. And then
21 it turns where Mr. Wilkinson's -- kind of where his
22 new farm building is, and comes down the draw. And
23 these are pictures of how -- what kind of flow that
24 it had.

25 Q. And are these buildings on the Wilkinson

17

1 and then turns by Wayne's home, and then comes right
2 here and crosses the road here.

3 Q. All right. Now, what is that picture of?

4 A. Oh, that's by my house. That's the field
5 that in the -- the flow was adequate that it had
6 inundated the whole area.

7 Q. And this was taken when?

8 A. In 1984.

9 Q. Let me -- oh, I'm sorry.

10 A. It was about February the 9th; something
11 like that.

12 Q. Let me show you these pictures, also.
13 When were these pictures taken?

14 A. Maybe about ten days ago.

15 Q. And by way of comparison, is the cabin
16 here that we're looking at in this picture of this?

17 A. Let's see. Yeah. This is the corner of
18 the log home that's here and here, and this is
19 looking down into the creek water by the driveway.
20 It's blocked now by the new storage buildings, so...

21 Q. So this drainage here is blocked?

22 A. This drainage here is right there. We're
23 very close to it.

24 Q. All right. And how about this? Where
25 does this --

19

1 property?

2 A. Yes. These are where the homes would be
3 built. They've been demolished now.

4 Q. And is that cabin still present?

5 A. Yeah. It was Wayne's home and Shawn --
6 help me out.

7 MR. WILKINSON: Dorius.

8 THE WITNESS: What is it?

9 MR. WILKINSON: Dorius.

10 THE WITNESS: Dorius. Shawn Dorius lives
11 there.

12 Q. (By Mr. Hathaway) You see the rocks
13 around here. Is that where the flood would come
14 through?

15 A. Yeah. It was such a high flow that the
16 spillway carried, you know, just a lot of water.

17 Q. And this picture, just so we're clear,
18 where it's failed here, that was --

19 A. That was the center of the dam. And
20 fortunately, it never digressed past that.

21 Q. Now, I'm going to hold the plat above
22 here. Show us where this drainage channel moves
23 through this property or where it comes on to this
24 property.

25 A. Let's see. It comes down the canyon here,

18

1 A. Let's see. This building here is still
2 existing, the one that you're pointing to. And then
3 which one?

4 Q. Okay. Which building is this on this
5 pond?

6 A. This one has been removed now, and this
7 one's been removed. This needs to pan that way to
8 pick this building out.

9 Q. Okay.

10 A. But right here, where this telephone pole
11 is, I believe where this pole is, is the back of the
12 building.

13 Q. And these photos are taken from portions
14 of the property that are included in this Coventry
15 Cove Subdivision?

16 A. Right. The storage units are actually
17 placed across here.

18 Q. Now, Mike, let me ask you this: The 30
19 years that you've lived here, do you pay property
20 taxes?

21 A. Ann does.

22 Q. Based on the property loan?

23 A. Yeah, we do.

24 Q. Does that include payment to the school
25 district?

20

1 A. Yes, it does.
 2 Q. And have you paid that as long as you've
 3 lived at the property?
 4 A. Yes, we have.
 5 Q. Since 1984, Mike, have you been present
 6 where you've observed additional flooding?
 7 A. Yes. After -- alterations were done in
 8 1984 and so it helped. But subsequent to 1984 there
 9 have been two incidents where flooding came down that
 10 spillway.
 11 Q. And which spillway? What are you
 12 referring to?
 13 A. Pardon me?
 14 Q. You said "spillway." What are you
 15 referring to?
 16 A. Yeah. Where the storage units are
 17 constructed now is actually the spillway for the
 18 reservoir.
 19 Q. Is there a name for this present dam?
 20 A. Yes. It's Wilkinson Reservoir.
 21 MR. HATHAWAY: That's all the questions I
 22 have of Mr. Wilkinson right now. Let's wait and see
 23 if any of the Board members have any questions, or
 24 opposing counsel.
 25 CHAIRMAN LUNDGREN: Questions from the

21

1 spillway rated at 12,000 cubic feet -- or second
 2 feet, is still an operating part of the reservoir.
 3 And water has come down in it twice. The primary
 4 spillway has only a limited ability. It can only
 5 take -- it's only a 24-inch pipe. And under normal
 6 years, or depending on how you operated the
 7 reservoir, there's lots of years that if you operate
 8 it correctly, you could make it work. In high water
 9 years, it has come down twice, and it will come down.
 10 MR. BROWN: Okay. Quickly, if the dam
 11 failed, heaven forbid, or we had high runoff, it's
 12 your contention that it would run through Coventry
 13 Cove Homes?
 14 THE WITNESS: Now, that's two questions.
 15 If the dam failed, it's estimated at 12,000 second
 16 feet, I have no idea.
 17 MR. BROWN: Okay. Let's not say the dam
 18 fails.
 19 THE WITNESS: But the high water, it will
 20 go down fails.
 21 MR. BROWN: If the high water changed, you
 22 know, in a 50 or 100-year flood plain, then it would
 23 go where the existing homes are proposed.
 24 THE WITNESS: It would go where the
 25 storage units are, not where the homes are.

23

Board?

MR. BROWN: When we address it, should we
 address the attorney or the witness?

CHAIRMAN LUNDGERG: You may address the
 witness directly.

MR. BROWN: Mike, when you were evacuated
 in '84, I thought the State came in at one time and
 there was talk of condemning the dam. It was later
 found that it was secure enough to hold water. We've
 never had another runoff since then. I know in the
 spring when the ground is frozen, it can get -- early
 spring, it can get --

THE WITNESS: Let me -- we may run out of
 time, but I think it's important in the issue here to
 bring up that a little bit. That was, they believed,
 was a piping failure, which means that it would be
 saturated clear through and would release in a single
 event. That's why the sheriff brought a notice for
 us to move. It turned out that it was actually the
 face of the dam of water from probably cow trails
 that got behind, forced it off. But the core, you
 know, hadn't failed.

Following that, in 1984, they added an
 additional spillway of 24-inch pipe, which can take
 -- it's the primary spillway. Okay? The secondary

22

1 MR. BROWN: All right.
 2 Q. (By Mr. Hathaway) Member Brown raised one
 3 point, if I could ask one follow-up question. In
 4 regard to the storage capacity of the Wilkinson Dam,
 5 has that been affected in any way by the Gardener
 6 Development that's going on?

7 A. The total storage hasn't. The in-flow, in
 8 all developments, the in-flow would be significantly
 9 higher.

10 Q. And why is that?

11 A. The impervious surface of the roads and
 12 the roof and driveways collect such an amount in such
 13 a short period that you have a flash. So it's not
 14 able to -- roots and grass and that can slow it down.
 15 And so you receive a head of water in 15 minutes,
 16 instead of in two hours. And so your cubic feet has
 17 just quadrupled. It's just enormous. The Reservoir
 18 would be a great asset to maintain to help that.
 19 But, yeah, the in-flow would be enormous.

20 CHAIRMAN LUNDGREN: Excuse me. What are
 21 these figures you just cited based upon?

22 THE WITNESS: I took them off from Dam
 23 Safety. It's noted on the Internet and the -- I
 24 just -- I know what all the figures on the Reservoir
 25 are. We do not know because -- I do not know, and I

24

Coventry Cove RUD Hearing

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SHEET 4

1 don't know if Austin knows it, there's been
2 calculations. They have a 60-inch pipe coming into
3 the reservoir, and a 10-inch pipe out the bottom, and
4 a 24-inch primary spillway. And so if their
5 calculation is even close with the 60-inch, it's
6 apparent to me that, you know, we'll have to preserve
7 the secondary spillway.

8 MR. MCCLELLAN: Mike, most subdivisions
9 are required, as they cover up ground that would
10 normally be used for drainage, they are required to
11 put in either detention ponds, or retention ponds to
12 alleviate that very scenario that you're talking
13 about, this flash. Has Gardener Development been --

14 THE WITNESS: The detention pond is the
15 reservoir. It's incorporated as part of the
16 development and you have .2 second feet per acre
17 allowable and so, you know, you probably have, I
18 don't know, 700 or 800 acres; whatever that is, it's
19 an enormous amount of water. That's what the 60-inch
20 pipe is about.

21 CHAIRMAN LUNDGREN: How will Coventry Cove
22 affect the amount of runoff?

23 THE WITNESS: Minimally. It wouldn't be,
24 you know, it ran there before. And, you know, it's
25 going to have more flash than it had, but this

25

1 effect, that the McMillans have been historically and
2 will continually be affected by whatever goes on the
3 Wilkinson property. And if that weren't enough, Mr.
4 Wilkinson testified that he and his wife have paid
5 property taxes on their property for several years,
6 and we've attached in our binder of exhibits, a copy
7 of a letter from the Morgan County School Board that
8 was attached in the application papers. It's under
9 Tab Number 1. I refer you specifically to the second
10 page, and I'll come back to this in a few moments,
11 but beginning in the first paragraph, the second
12 line, "At our current enrollment, we generate \$891
13 per student in the maintenance and operation budget
14 from local property taxes. In order to maintain our
15 current level of local funding in each of the M&O
16 budgets, we would require a home with the market
17 value of \$484,885 to fund each additional child that
18 required us to add to our current capacity."

19 Moving down that same paragraph, the last
20 sentence, "The fact that the homes in your
21 subdivision --" this is a letter addressed to Mr.
22 Wilkinson, "will tend to attract younger families
23 with more children while producing a lower tax base,
24 will probably create a greater financial burden on a
25 per home basis for the district."

27

1 acreage is small enough that we don't think that's an
2 issue to us. And Rex has built into it detention
3 ponds, and because of the smaller volume of the land
4 being developed and the detention ponds, we think
5 that's, you know, that part will work fine. It's
6 this other enormous drainage, the Bowman Hollow
7 Drainage.

8 MR. HATHAWAY: Thank you. There are a
9 handful of arguments that I would like to make in
10 focusing on some of the documents that have been
11 attached to the application and that have been part
12 of the record previously reviewed, considered, and
13 incorporated in the approval of this subdivision.

14 But first, with respect to Mike and Ann
15 McMillan's position, the Morgan County Code provides
16 that any person adversely affected by the Land Use
17 Authority's decision in administering or interpreting
18 the Land Use Ordinance, may file an appeal. The
19 ordinance says you may file an appeal within 30 days.
20 The issue is whether or not the McMillans are
21 adversely affected by the Land Use Authority's
22 decision.

23 Now, I think that it's fairly clear, while
24 notwithstanding the fact that the County argues that
25 mere proximity is adequate to show the adverse

26

1 Moving down to the third paragraph at the
2 top, halfway through, the sentence ending, "A portion
3 of the additional cost will be offset by an increase
4 in local property tax revenues as a result of the
5 homes that are built in the development." So not
6 only do we have proximity, not only have we had
7 historical flooding and concerns related to the
8 runoff from the dam, that's now been aggravated.
9 It's been aggravated by virtue of the 60-inch pipe
10 from the subdivision. But the Wilkinson's property
11 tax is going to be affected, as will everybody
12 else's, adversely as a result of the approval of this
13 subdivision as it goes in.

14 MR. WRIGHT: Just for the record, I'm
15 going to object to that exhibit's characterization
16 for its entry because it's hearsay.

17 CHAIRMAN LUNDGREN: Objection sustained.
18 Do you wish to address it?

19 MR. HATHAWAY: May I respond briefly?

20 CHAIRMAN LUNDGREN: You may.

21 MR. HATHAWAY: Well, first, I believe
22 under the Utah Administrative Procedures Act in a
23 Board situation like this, hearsay is appropriate if
24 it's the type of thing that is typically relied on by
25 people making decisions as they relate it to their

28

1 home.

2 Second, this is part of the County's
3 record. It was submitted by the Wilkinsons. It was
4 attached to their application. It was relied on by
5 them in their Fiscal Analysis, it's attached to their
6 Development Agreement. And even if it is hearsay, I
7 believe it fits under the exception of the County
8 record and record maintained by the County kept in
9 the ordinary course of business, notwithstanding the
0 fact that it may be hearsay. But, again, as I noted,
1 I believe that this panel can appropriately consider
2 hearsay as part of its deliberations this evening.

3 CHAIRMAN LUNDGREN: You may continue, Mr.
4 Hathaway.

5 MR. WRIGHT: Same objection. I would also
6 suggest foundational issues, as well, and submit it
7 to the Board.

8 CHAIRMAN LUNDGREN: Do you wish to comment
9 on the foundational issues?

0 MR. HATHAWAY: Again, this was a record
1 that was produced by the County pursuant to a GRAMA
2 request. It was a record that was received from Mr.
3 Wilkinson as part of his application process. It's
4 referred to expressly in his Development Agreement
5 Fiscal Study. And in terms of foundation, I find it

29

1 aware of. But other than those three PODs that I've
2 been personally involved in, I don't know how many
3 other subdivisions are under construction.

4 CHAIRMAN LUNDBERG: Any comment raised
5 regarding Mr. Wright's objection?

6 MR. BROWN: When I served on the Planning
7 Commission, we used these formulas all of the time to
8 come up with density issues and other things; whether
9 it's -- I'm a little concerned with Kelly's, "It's
10 hearsay." We used those formulas, whether it was a
11 \$480,000 home or not, to pay for the property tax for
12 an increased child. We use these formulas all of the
13 time.

14 MR. WRIGHT: May I address that?

15 CHAIRMAN LUNDGREN: You may.

16 MR. WRIGHT: I'm not sure that there's
17 been foundation that this was actually considered and
18 used and adopted in these procedures. We do have a
19 Fiscal Impact, and that is part of the Development
20 Agreement. I'm not sure that it relies on this.
21 This is information that Mr. Wolfe relies on somebody
22 else --

23 MR. BROWN: Well, it's a State -- I think
24 it's a State mandate that they come up with. And
25 depending on your community and your evaluations and

31

somewhat odd that the County would take a position
based on a document that they themselves produced by
an agency of the County, designed specifically for
evaluating the Fiscal Impact of subdivisions in the
process.

Again, you know, the Foundation issues --
the rules of evidence don't apply specifically and
directly to an administrative tribunal notwithstanding
the judicial function. And I think I would
implore, Mr. Chair and panel, to consider those types
of evidentiary objections in context of the
Administrative Procedures Act, and allow that kind of
evidence to the extent that there are kinds of
evidence that people typically rely on in making
planning and zoning decisions, respectfully.

CHAIRMAN LUNDBERG: Any comment from the
Board?

MR. McCLELLAN: Mr. Hathaway, do you know
how many subdivisions are currently under
construction in Morgan County?

MR. HATHAWAY: Do I personally know? I
know that there are three POD overlays; that one is
under construction, I believe. Frankly, I think this
one is under construction, if my eyes don't deceive
me. And there's another one on the books that I'm

30

1 stuff, I think it comes from the State; is that
2 right?

3 MR. WRIGHT: This letter?

4 MR. BROWN: Well, no. The figures that he
5 comes up with in the letter.

6 MR. WRIGHT: That's part of the problem.
7 I don't have Mr. Wolfe here to ask him that question,
8 what it's based on, so it ends up being hearsay. I
9 guess that's the issue, that's the question.

10 CHAIRMAN LUNDGREN: I would suggest, and I
11 would appreciate input from the Board, that Mr.
12 Hathaway be allowed to continue with the noted
13 objections from Mr. Wright; that there is a question
14 about the foundation and background of this document,
15 whether or not the County actually relied upon it,
16 which may be subject to further testimony.

17 Mr. Wright?

18 MR. WRIGHT: Could I just make one
19 comment, too? I am not intending to slow this down
20 or otherwise. But from our standpoint, we have a
21 court reporter here, and it's my understanding that
22 if this goes to a further stage, this is the record.
23 And if I've failed to raise the issue now, I'm
24 concerned about being precluded at a later point.

25 CHAIRMAN LUNDBERG: Thank you, Mr. Wright.

32

Coventry Cove PUD Hearing
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<p>SHEET 5</p> <p>1 Mr. Hathaway?</p> <p>2 MR. HATHAWAY: Thank you. I'll move on.</p> <p>3 I would like to review briefly a couple of Code</p> <p>4 provisions that I consider to be precedent in our</p> <p>5 meeting this evening. First, the authority of this</p> <p>6 Board on the Utah Code Annotated, Section</p> <p>7 17-27a-701(1) includes appeals from decisions</p> <p>8 applying the Land Use Ordinances.</p> <p>9 The reason I mention that is the State has</p> <p>10 argued that this is, in fact, a legislative function</p> <p>11 and this Board lacks jurisdiction to consider</p> <p>12 legislative acts, legislative and zoning decisions.</p> <p>13 With all due respect, a legislative function is rule</p> <p>14 making. Nobody here -- Mr. Wilkinson has not</p> <p>15 proposed that the master plan be revised, that the</p> <p>16 zoning ordinance be revised, there's been no rule-</p> <p>17 making discussion, or there's been no rule-making</p> <p>18 function. This panel, by its own mandate and by the</p> <p>19 mandate of the Utah legislature, is to hear appeals</p> <p>20 of the application of the zoning ordinance to</p> <p>21 specific subdivisions. That's what has happened</p> <p>22 here.</p> <p>23 Morgan County's own new code, Section</p> <p>24 16-62-03 provides, and it's clear, and I think it's</p> <p>25 worth noting the distinction between the roles of the</p> <p>33</p>	<p>1 de novo shall determine the correctness of the</p> <p>2 decision in its interpretation and application of the</p> <p>3 Land Use Ordinance."</p> <p>4 Now, the Utah Supreme Court in 1995 has</p> <p>5 defined what the de novo means in the Archer vs.</p> <p>6 Board of State Land's Decision. De novo is, quote,</p> <p>7 "Review by trial. De novo means a new trial with no</p> <p>8 deference to the administrative proceeding below."</p> <p>9 Again, Morgan County's ordinance provides for de novo</p> <p>10 review. This panel need not defer in any manner to</p> <p>11 the decisions that have been made by the Planning</p> <p>12 Commission or the County Council in the approval of</p> <p>13 this subdivision.</p> <p>14 With respect to the substance, we urge</p> <p>15 that the Council and the Planning Commission, for</p> <p>16 that matter, erred in grandfathering a commercial use</p> <p>17 in this case. Now, I've included in our exhibit</p> <p>18 under Tab 3, the Affidavit of Rex Wilkinson. This</p> <p>19 was an affidavit that was signed by Mr. Wilkinson</p> <p>20 under oath on May 18th. Well, it's blank under his</p> <p>21 signature. It was notarized May 18th of 2005 and</p> <p>22 submitted in conjunction with the Development</p> <p>23 Agreement for purposes of receiving approval in this</p> <p>24 case.</p> <p>25 If the panel takes a look at the third</p> <p>35</p>
<p>1 Planning and Zoning Commission and the County Council</p> <p>2 and this panel. But in every instance, it has to do</p> <p>3 with the application of the zoning ordinance and</p> <p>4 particularly, in this case, has nothing to do with</p> <p>5 rule making. So I think it's worth noting that the</p> <p>6 authority of this Board clearly comprehends what is</p> <p>7 being sought here today in the application of</p> <p>8 boarding and zoning ordinance as it applies to the</p> <p>9 Wilkinson, the Coventry Cove application.</p> <p>10 Now, as Mr. Chair pointed out, Mr.</p> <p>11 McMillan recognizes that they have the burden of</p> <p>12 proof; that's the burden of going forward and putting</p> <p>13 on evidence to support our claim that there's</p> <p>14 essentially been error, an abuse of discretion by the</p> <p>15 County Council in the final approval in this case.</p> <p>16 One last note in this regard. According</p> <p>17 to Utah Code, again, 17-27a-707, as well as the</p> <p>18 Morgan County Code 16-06-240(6), the Board of</p> <p>19 appeals, quote, "Shall review the Land Use</p> <p>20 Authority's decision administering or interpreting a</p> <p>21 Land Use Ordinance." That's worth noting because</p> <p>22 it's administering and interpreting, as long as we</p> <p>23 don't try to amend the rule itself, or the ordinance</p> <p>24 itself and plan itself, but in administering and</p> <p>25 interpreting permitted purpose, "a Land Use Ordinance</p> <p>34</p>	<p>1 paragraph, I would like to read that. "The Shop has</p> <p>2 been in existence since 1971. I am familiar with the</p> <p>3 use to which the shop and surrounding property has</p> <p>4 been used in the past. That use was consistent with</p> <p>5 residential and small commercial construction."</p> <p>6 "That use was consistent with residential</p> <p>7 and small commercial construction." Even if what Mr.</p> <p>8 Wilkinson says in his affidavit is true, and we've</p> <p>9 heard the testimony of Mr. McMillan in regard to what</p> <p>10 he's observed, and that is, that it was used as</p> <p>11 storage, and on one occasion, to develop some</p> <p>12 equipment; but even if it's true that it was used for</p> <p>13 small residential and commercial construction, it is</p> <p>14 a nonconforming use for A-1 property or RR-1</p> <p>15 property, which is what this property was zoned prior</p> <p>16 to the changes that have taken place pursuant to this</p> <p>17 subdivision.</p> <p>18 Utah Code Annotated 17-27a-510 says,</p> <p>19 quote, "Except as provided in this section, a</p> <p>20 nonconforming use or noncomplying structure may be</p> <p>21 continued by the present or future property owner."</p> <p>22 Then it defines "nonconforming use." Under</p> <p>23 sub-section 103-24. "Nonconforming use means a use</p> <p>24 of land that legally existed before its current land</p> <p>25 use destination." And (B), "has been maintained</p> <p>36</p>

1 continuously since the time of the Land Use Ordinance
2 regulation governing the land changed."

3 Now, again, spotting -- in giving Mr.
4 Wilkinson the benefit of the doubt that it was used
5 for residential and small commercial, that is a
6 nonconforming, and it's a conditional use for A-1 and
7 RR-1. And Mr. Wilkinson has the burden of
8 persuading, convincing the Planning Commission, the
9 County Council, and really ultimately this panel,
0 that the use legally and continuously existed over
1 the years that are in question that are set forth in
2 his affidavit; namely, since 1971.

3 Now, there is no evidence, there is no
4 record, in fact, there are no records of the County
5 in regard to a building permit or anything
6 authorizing the use of these buildings for anything
7 other than a storage unit from 1971 to the present.
8 Since, and more importantly, there has never been a
9 conditional use provided for the use of a small
0 commercial or residential construction company in the
1 buildings on the Wilkinson property that until,
2 again, this subdivision was A-1 and RR-1.
3 Consequently, it was not legal, it was not a legal
4 use, and it has not been continuous, there's no
5 evidence, and Mr. Wilkinson is unable to produce any

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1 ten acres. All of the density is crammed into five.
2 Now, yes, in the strictest sense there is
3 open space. In the strictest sense there are other
4 uses. But considering the master plan of Morgan
5 County, considering this originated as an
6 agricultural piece of property, not within any sort
7 of an incorporated area in the County, sitting really
8 out in pastures, to compress and to create a
9 subdivision that authorizes lot sizes from 3,000
10 square feet to 9,000 square feet makes no sense in
11 light of the master plan.

12 And by the way, just driving in this
13 evening, I was looking around here downtown, downtown
14 Morgan City, and I was hard-pressed to see any
15 subdivision in town where lots were 3,000 square feet
16 to 9,000 square feet. And this is particularly
17 interesting here where the underlying zone is R-120
18 which requires a 20,000 square foot lot, the minimum,
19 even under the zoning changes taking place.

20 Now, there are a couple of ways that the
21 Wilkinsons were able to get there, and I would like
22 to talk about those specifically. First, it has to
23 do with what has been referred to as -- well, the
24 first premise that I think is flawed is the reliance
25 on the entire ten acres in compacting and receiving

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evidence that would support that conclusion.

Second point I would like to make in
regard to the substance of the application. Given
the purpose of the Morgan County Land Use Management
Code, specifically under the PUD Overlay Provisions,
and this is under Chapter 35, 16-35-010, the purpose
of the PUD Overlay Zone chapter -- I'll give
everybody the opportunity to get to it. The first
paragraph, "The PUD Overlay Zone Chapter is to
encourage innovative and efficient utilization of
land to develop a sense of community and to ensure
compatibility with the surrounding neighborhoods and
environment consistent with the Morgan County General
Plan." There's the general overriding purpose for
these types of subdivisions. And really the
McMillans do not contest that under the PUD Overlay
Zone that existed I understand until just recently in
Morgan County, that certainly, under certain
circumstances, meeting certain requirements, that
increased density would be appropriate.

However, viewed in context with the Morgan
County General Plan, this subdivision just really
doesn't make sense. And I refer back to the blowup
of the subdivision that I have for this purpose. The
entire tract is approximately 9.88 acres, just under

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1 the density of these 18 units within five and-a-half,
2 I think that was a problem, initially.

3 Secondly, in order to get the 18 units
4 ultimately within this five and-a-half acres, they
5 had to receive certain adjustments. They received
6 bonus density and a total of 37 percent, but notably,
7 15 percent of the 37 percent was based on a
8 representation that this was going to be affordable
9 housing.

10 A few problems with the affordable housing
11 equation. First, if you read the Development
12 Agreement and you look at the middle, there simply is
13 no calculus on whether or not these, in fact, are
14 affordable houses and are going to be affordable
15 houses. There are some numbers thrown around, but no
16 equating of what 80 percent of the average income in
17 Morgan County is, and extrapolating that out to
18 determine whether or not the proposed homes that
19 would be built here can be afforded by somebody
20 making 80 percent of that mean wage. But, more
21 problematic is this: The Morgan Plan requires that,
22 in particular, it's Morgan County General Plan 1.3.1
23 requires a guarantee that affordable homes are going
24 to be built here, because nothing really would stop
25 any developer from getting approval and flipping this

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<p>SHEET 6</p> <p>1 over and selling it to somebody else.</p> <p>2 Quite frankly, nothing in the development</p> <p>3 plan would stop Mr. Wilkinson, if he chose, to turn</p> <p>4 around and build homes that are more expensive than</p> <p>5 those originally proposed. Why? Well, because</p> <p>6 there's nothing in the Development Agreement, there's</p> <p>7 nothing in any of the documents whereby he agrees and</p> <p>8 guarantees, essentially, that affordable homes would</p> <p>9 be built.</p> <p>10 Referring specifically to Morgan County</p> <p>11 General Plan 1.3.1, this is in Chapter 9.</p> <p>12 I'm sorry. If I can have just a minute to</p> <p>13 get here. It says, "Policy: Create density bonuses</p> <p>14 in the form of additional dwelling units. If density</p> <p>15 bonuses are adopted, they should be allowed only</p> <p>16 where they supply housing for clearly expressed</p> <p>17 community needs and should be coupled with</p> <p>18 limitations on the future use and sale of the housing</p> <p>19 units." There is no such coupling in this case.</p> <p>20 There is no such guarantee or assurance that, in</p> <p>21 fact, affordable housing will be built.</p> <p>22 Now, there are a couple of other problems,</p> <p>23 and let me just touch on it with respect to the</p> <p>24 affordable housing; that is, under the Morgan County</p> <p>25 Ordinance, "Affordable housing is to be built in a</p> <p style="text-align: right;">41</p>	<p>1 continue to interpret it as expanding, as</p> <p>2 neighborhoods are added to the city, because you do</p> <p>3 have some expansion out sort of through where the</p> <p>4 airport is and up the hill over towards where the</p> <p>5 church is, and then you've got Gardener going in.</p> <p>6 But there are a couple of big gaps. And so if it's</p> <p>7 defined as where neighborhoods have been created to</p> <p>8 cause the expansion, you've still got the gaps.</p> <p>9 You've still got the jumps. And there is no -- that</p> <p>10 I'm aware of, I think it's subject to interpretation.</p> <p>11 In fact, I think the interpretation is more liberal.</p> <p>12 But in terms of there being an express provision, no.</p> <p>13 There is no expressed definition of a boundary.</p> <p>14 MR. MULLEN: I will beg to differ with you</p> <p>15 there, Counsel. The area plan from Mountain Green</p> <p>16 does have specific boundaries for the town of</p> <p>17 Mountain Green, but they were not implemented until</p> <p>18 after this decision had been made. The area plan,</p> <p>19 the original area plan for Mountain Green that was</p> <p>20 amended here last spring did not have a definite</p> <p>21 boundary set for the town of Mountain Green. It's an</p> <p>22 unincorporated area, as you're aware, and until the</p> <p>23 Area Plan Committee had finished their work and it</p> <p>24 was adopted by the governing body here, which was</p> <p>25 after this May 17th decision was made, during that</p> <p style="text-align: right;">43</p>
<p>1 PUD Overlay Zone Amendment that may only be</p> <p>2 considered --" I'm referring to 16-35-6, "and applied</p> <p>3 within towns and villages identified within the</p> <p>4 general plan." This is out on Old Highway, out on</p> <p>5 the Old Highway, and there is no town or village</p> <p>6 where it -- it makes sense that you want to have that</p> <p>7 kind of affordable and high-density housing where you</p> <p>8 can attract families that are close to the schools,</p> <p>9 close to the work places, close to the kinds of</p> <p>10 things that one is going to want to have available.</p> <p>11 CHAIRMAN LUNDBERG: Are the boundaries and</p> <p>12 towns and communities defined in the Land Use</p> <p>13 Management Code?</p> <p>14 MR. HATHAWAY: No, they're not.</p> <p>15 CHAIRMAN LUNDGREN: Are they defined only</p> <p>16 in area plans, such as the Mountain Green Area Plan?</p> <p>17 MR. HATHAWAY: I believe that that's where</p> <p>18 it is, yes.</p> <p>19 MR. MULLEN: Yes.</p> <p>20 CHAIRMAN LUNDBERG: And does this</p> <p>21 development fit within the boundaries of the Mountain</p> <p>22 Green Area Plan?</p> <p>23 MR. HATHAWAY: Well, you know, I don't</p> <p>24 know whether it frankly does. Perhaps as it's been</p> <p>25 interpreted, it may. You know, if you're going to</p> <p style="text-align: right;">42</p>	<p>1 process, the town boundaries were discussed and came</p> <p>2 to conclusion for what they were. And this area does</p> <p>3 fall under those provisions of the town boundaries at</p> <p>4 this time. But it did not at that time because there</p> <p>5 was no defined town boundary. Just a clarification</p> <p>6 for you.</p> <p>7 MR. HATHAWAY: Thank you. And I would</p> <p>8 have to defer to you, Mr. Vice-chair, because that</p> <p>9 decision would be news to me.</p> <p>10 MR. MULLEN: Certainly. I understand. I</p> <p>11 want to make sure that that's a fair assessment of</p> <p>12 what went on.</p> <p>13 CHAIRMAN LUNDBERG: Well, let's ask</p> <p>14 Sherrie, if you don't mind, Mr. Hathaway.</p> <p>15 MR. HATHAWAY: Not a problem.</p> <p>16 CHAIRMAN LUNDBERG: Is that correct?</p> <p>17 MS. CHRISTENSEN: I believe that the</p> <p>18 boundaries of the Mountain Green Area Plan were</p> <p>19 defined and it is within that. The work that the</p> <p>20 Mountain Green Area Plan did was to define the</p> <p>21 boundaries of the neighborhoods specific to the</p> <p>22 Mountain Green Area plan. And within the general</p> <p>23 plan, Mountain Green Area is designated as a town</p> <p>24 center, and then the other areas within the County</p> <p>25 are designated as villages. So Stoddard and Milton</p> <p style="text-align: right;">44</p>

1 are villages. Peterson is a village. Mountain Green
2 is the only town. And then Morgan City, of course,
3 is the only incorporated city.

4 CHAIRMAN LUNDGREN: And under the older
5 version of the Mountain Green Area Plan, would this
6 have been within its boundaries?

7 MS. CHRISTENSEN: It would have been
8 within its boundaries. Just the boundaries of the
9 neighborhoods were not identified at that time,
10 neighborhoods within the town.

CHAIRMAN LUNDBERG: Okay.

MR. HATHAWAY: So if I understand it
correctly, there was a definition to include the
neighborhoods, but the specific neighborhoods were
not included in any sort of boundary definition.

MR. MULLEN: Originally.

MR. HATHAWAY: I think that's consistent
with what my understanding was.

MR. WRIGHT: Just a clarification; it was
within the town, is that what I'm understanding?

MS. CHRISTENSEN: Yeah. The area is
included within the Mountain Green Area Plan town
boundaries. The charter for the Mountain Green Area
Plan Committee was to define specific neighborhoods
within the town boundaries where dense or residential

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1 development.

2 CHAIRMAN LUNDGREN: And I think that same
3 language is used in the current County.

4 MS. CHRISTENSEN: Yes. The only
5 difference that was made was in the actual maps
6 that's identified in neighborhoods in the Mountain
7 Green area.

8 MR. MULLEN: There is a clarification
9 here, however, though. That is, of me. And that is
10 under Chapter 9, Policy 1.7.1. It says, "The
11 appropriate areas within Morgan County for affordable
12 housing may be appropriate by the town and village
13 centers," as opposed to just the towns and villages.

14 MS. CHRISTENSEN: Right.

15 MR. MULLEN: So that's part of the general
16 plan, actually, just for clarification purposes.

17 CHAIRMAN LUNDGREN: So just so the record
18 is clear, would Coventry Cove be considered a town
19 center?

20 MS. CHRISTENSEN: No, it would not be. It
21 would be considered to be a neighborhood that's
22 within the town.

23 CHAIRMAN LUNDBERG: Do we have another
24 comment?

25 MR. VANWORMAN: Could you redirect me to

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development would occur.

CHAIRMAN LUNDBERG: Okay.

MR. MULLEN: I believe also, though,
Sherrie, that part of what we did is we had to define
the town boundaries because they weren't specifically
defined until that committee met.

MS. CHRISTENSEN: In the Code -- or the
General Area Plan, prior to that, the boundary is
defined in Chapter 2. And it states, "The Mountain
Green master plan area comprises of the most
northwesterly part of Morgan County. The boundary
begins at the intersection of Weber River with the
western Morgan County line, then north and east along
the Morgan County line, through the Snow Basin area,
to the east side of Cottonwood Canyon drainage, then
southwest along the side of Cottonwood Canyon
drainage until it intersects with the Weber River in
the area of Interstate-84, Peterson/Mountain Green
exit, and thence along the Weber River westerly to
the point of the beginning." So I believe it would
have included the Wilkinson property.

CHAIRMAN LUNDGREN: Now that's from the
earlier Mountain Green Area Plan?

MS. CHRISTENSEN: Yes. Which was in
existence prior to the application for the

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1 what you just read?

2 MR. MULLEN: Chapter 9, Policy 1.7.1 on
3 Page 50.

4 MR. HATHAWAY: In addition, if I
5 understood Ms. Christensen correctly, she was
6 defining the area, not the town. In any event -- and
7 I think that's why you finally had the clarification
8 earlier this year with respect to the town.

9 MR. MULLEN: That's correct. And to make
10 a clarification between a neighborhood. This would
11 not be considered a neighborhood under the area plan,
12 it would be considered a cluster. Because a
13 neighborhood, it may be within -- I would have to
14 look at the plan again to see what the neighborhoods
15 are, but it may be within an existing neighborhood
16 that comprises over where the Cottonwood's Phase 1
17 would be located in Rosehill. Does that fall within
18 those boundaries?

19 MS. CHRISTENSEN: It's within the
20 neighborhood boundary of the Cottonwood, Rosehill,
21 Fox Hollow cluster.

22 MR. MULLEN: Thank you.

23 MR. HATHAWAY: Thank you. A final comment
24 on this high-density issue. Again, the goal being to
25 be consistent with the Morgan County General Plan and

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<p>SHEET 7</p> <p>1 also to be consistent with the community in which the 2 high-density subdivision is placed. It turns out 3 that this PUD Overlay Zone really is placed in the 4 middle of an agricultural area, notwithstanding what 5 may definitionally have been extended to be the 6 boundaries of a town, or an area, or whatever it may 7 be. When one looks at it, it's a cluster stuck in 8 the middle of what has historically been an 9 agricultural area that is evidenced by the zoning.</p> <p>10 It really is more than a high-density and 11 I respectfully would suggest that it ought to be 12 considered a hyper-density subdivision placed in an 13 area where it is completely opposite of what the 14 existing historical use has been in the area. It's 15 simply out of place, and it makes no sense under the 16 circumstances, especially in considering the General 17 Plan with the provisions we've looked at, in 18 particular Chapter 2, 2.7, the policy, as pointed out 19 by Mr. Vice Chair Mullen; Chapter 9, 1.7.1. And the 20 density just simply does not make sense where it is. 21 And again, as noted, to get there, they had to do 22 some things with the affordable housing and so forth.</p> <p>23 CHAIRMAN LUNDGREN: Question, Mr. 24 Hathaway. Does not Coventry Cove and the location 25 where these homes are located immediately abut to</p> <p>49</p>	<p>1 Rosehill, which is a PRD and was 70 lots, that has 2 been fully approved, and, in fact, approved with 3 roads, sewer, and homes being built, probably. They 4 have permits outstanding in at least half of the 5 lots. The future phases of the Cottonwood currently 6 have a concept approval for an additional 760 lots, 7 which are further to the north in various clusters.</p> <p>8 CHAIRMAN LUNDBERG: Now, directing your 9 attention to Silver Leaf Drive. Is that part of the 10 Cottonwood at Rosehill subdivision that has already 11 been fully approved?</p> <p>12 MS. CHRISTENSEN: Yes, it is.</p> <p>13 MR. HATHAWAY: And I would assure you that 14 if one would take a tape measure and measure all of 15 the 800 proposed lots in the Cottonwood subdivision, 16 not one of them is 3,000 square feet or even 9,000 17 square feet.</p> <p>18 MR. VANCAMPEN: I was going to ask if you 19 can -- what is the range of lot sizes in the 20 Cottonwood subdivision? Do you have that, off the 21 top of your head?</p> <p>22 MS. CHRISTENSEN: Within the Cottonwood at 23 Rosehill, those lots, the smallest are approximately 24 1/3 acre. So between 13,000 and 15,000 would be just 25 off the top of my head. I can go and pull those</p> <p>51</p>
<p>1 Cottonwood?</p> <p>2 MR. HATHAWAY: No.</p> <p>3 CHAIRMAN LUNDGREN: Would you clarify that 4 on one of your maps for us?</p> <p>5 MR. HATHAWAY: I would be happy to take a 6 look. Well, okay. This side abuts a future -- I 7 don't believe this is a current subdivision that's 8 going forward, but I think it's anticipated at some 9 point and it will be part of the Cottonwoods.</p> <p>10 MR. WILKINSON: There's houses there now. 11 There's no gap.</p> <p>12 CHAIRMAN LUNDGREN: Sherrie, can we get 13 some input from you on this? Does Coventry Cove 14 immediately abut to the Cottonwood subdivision?</p> <p>15 MS. CHRISTENSEN: Yes.</p> <p>16 CHAIRMAN LUNDBERG: Are there homes being 17 built in the Cottonwood subdivision next to where 18 this development is?</p> <p>19 MS. CHRISTENSEN: Yes. Directly across 20 from Silver Leaf Drive, which is primary access to 21 the residential portion of Coventry Cove.</p> <p>22 CHAIRMAN LUNDGREN: And has this part of 23 the Cottonwood subdivision, passed all final planning 24 plat approval?</p> <p>25 MS. CHRISTENSEN: The Cottonwood at</p> <p>50</p>	<p>1 plats for you.</p> <p>2 CHAIRMAN LUNDBERG: Are any of those 1/3 3 acre sites abutting the Coventry Cove property?</p> <p>4 MS. CHRISTENSEN: They're across from 5 Silver Leaf Drive.</p> <p>6 MR. MULLEN: The other side.</p> <p>7 MS. CHRISTENSEN: To the --</p> <p>8 CHAIRMAN LUNDBERG: Would you mind 9 pointing to this on the map?</p> <p>10 MR. HATHAWAY: It's right here. And it is 11 across the street from Silver Leaf, is what she's 12 talking about.</p> <p>13 MS. CHRISTENSEN: So if the top of the map 14 is north, Silver Leaf Drive comes here and connects 15 with Marigold Drive. Marigold Drive then becomes a 16 system of two loops. There are 70 homes within those 17 two loops.</p> <p>18 CHAIRMAN LUNDBERG: Okay. And the strip 19 of property that lies between Coventry Cove and 20 Silver Leaf Drive --</p> <p>21 MS. CHRISTENSEN: Is this open space.</p> <p>22 CHAIRMAN LUNDGREN: That is open space. 23 So no lots will be built there?</p> <p>24 MS. CHRISTENSEN: There are no lots in 25 this open-space parcel. It's probably a swath of, my</p> <p>52</p>

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1 guess would be, starting about 50 feet and then
2 widens out to a couple of hundred feet up here. But
3 it's the open space dedicated by Cottonwood
4 Development.
5 CHAIRMAN LUNDBERG: Okay.
6 MR. BROWN: We might have a point of
7 interest. I was on the Planning Commission when this
8 was proposed.
9 CHAIRMAN LUNDBERG: Let's make that on the
10 record. Did you pick that up?
11 REPORTER: No.
12 CHAIRMAN LUNDBERG: Would you repeat that
13 again?
14 MR. BROWN: I was on the Planning
15 Commission when this first came to the Planning
16 Commission, and I did not vote on it. There was no
17 votes at the time. It was in its first stages. In
18 fact, it doesn't even look close to what was
19 presented to us.
20 CHAIRMAN LUNDBERG: And how long ago was
21 that?
22 MR. BROWN: It would be in the fall of
23 2003, I believe.
24 CHAIRMAN LUNDBERG: And did you, at that
25 hearing or meeting with the Coventry Cove people,

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form any opinions at that time that affect your
ability to render an impartial decision tonight?

MR. BROWN: No. It's in the minutes, my
comment. I don't think it has any bearing on it.
But my comments are in the minutes. Do you want me
to read them?

CHAIRMAN LUNDBERG: Yes, please.

MR. BROWN: I've got to find them. Here
it is. This is August 21, 2003. When it was first
given to us, it was two big houses with eight -- is
that right, Rex? Is it eight units per house?

MR. WILKINSON: Yeah. Eight-plexes.

MR. BROWN: My comment was, "Member Brown
stated he believed it works to get the homes off the
street. This is following the discussion of how they
would stack up. He noted he has had experience with
this type of development and they usually attract a
lot of young families with kids, and those kids would
be all over the streets unless appropriate
landscaping is required.

CHAIRMAN LUNDBERG: Okay.

MR. BROWN: And then -- but that's the
only meeting I had on this.

CHAIRMAN LUNDBERG: Any further
declarations of conflict?

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1 MR. BROWN: Thanks, Chris.
2 MR. VANCAMPEN: Sorry. I didn't mean to
3 call you on it.
4 CHAIRMAN LUNDBERG: Sorry to interrupt
5 you, Mr. Hathaway, but that was important business.
6 MR. HATHAWAY: I agree. I was just
7 consulting with my client of whether to consider that
8 to be a conflict or a problem and he has none.
9 CHAIRMAN LUNDBERG: Then this would
10 probably be an appropriate time to hear from other
11 counsel if they believe that's a conflict that causes
12 problems for them.
13 MR. WRIGHT: From my standpoint, I
14 appreciate the disclosure. I think that's critical.
15 It's important that we get out what the
16 representation is. And this has gone over a long
17 period of time, and I am comfortable with Mr. Brown's
18 representation.
19 CHAIRMAN LUNDBERG: Thank you.
20 MR. HAMMOND: I'm similar. Coventry Cove
21 has no problem with the representation.
22 CHAIRMAN LUNDBERG: Thank you, sir.
23 Go ahead, Mr. Hathaway.
24 MR. HATHAWAY: Thank you. Two last
25 points. The Fiscal Analysis relied upon the

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1 Development Agreement which also has some patent laws
2 in it. The statement as included in the Development
3 Agreement is, quote, The net impacts to the County
4 General and Special Funds are marginally positive,
5 while the net impact to the Morgan School District is
6 marginally negative, closed quote. That's on the
7 Development Agreement, I believe that's Exhibit 7 or
8 maybe Page 7. I have a 7 written down. We'll
9 clarify that.

10 Here are the two problems. First, the
11 Fiscal Impact Analysis relied on the construction of
12 16 nonview homes and three of them were view homes, a
13 total of 19 homes. In fact, the final subdivision is
14 18 homes. So there's one additional home included in
15 the cap list that inappropriately skews the benefit.

16 Second, it's primarily based, if one
17 reviews the Fiscal Impact, the cash flow is primarily
18 based on the operation of the bed and breakfast which
19 was proposed on the same property. However, over,
20 right here, you'll note, it says "future bed and
21 breakfast." Mr. Wilkinson has no specific plan on
22 when to build the bed and breakfast, only that at
23 some time in the future he will build a bed and
24 breakfast. Again, I believe that there is undue
25 weight placed on the income, therefore, since it's

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1 not going to be part of the original development, in
2 making that fiscal determination the County has made.
3 And consequently, it's skewed.

4 Finally, as noted again, and this is why
5 the letter was submitted, but that is submitted, that
6 is submitted by Mr. Wilkinson in support of his
7 application. It was noted by the school district in
8 a letter written to Mr. Wilkinson in formulating this
9 Fiscal Analysis, there was a statement that's
10 completely different than the "marginally negative"
11 included in the fiscal statement.

12 Last point. As pointed out by Mr.
13 McMillan, this proposed subdivision lies in what is
14 clearly flood path of the Wilkinson Dam. The Morgan
15 County Code 16-28-010 addresses that special public
16 consideration should be given by the Planning
17 Commission and the County Council in making the
18 decision ultimately on approval of the subdivision.

19 Now, it's not to say that there couldn't
20 be some changes made that would accommodate
21 anticipated volumes from the Wilkinson Dam. There
22 simply are none, and none have come up, and none have
23 been discussed and proposed in the process of the
24 approval package here. And as we can see by the 1984
25 photos, and this is prior to the Cottonwood

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1 subdivision and the 60-inch pipe emptying into the
2 reservoir behind Wilkinson Dam, there could be. And
3 it's not beyond the realm of possibility for there to
4 be considerable flows coming up against the dam and
5 exceeding the capacity of the pipe coming out of the
6 dam.

7 The initial spillway requiring the use of
8 the second spillway, which as Mr. McMillan pointed
9 out, runs right into the side of the proposed
10 buildings in the subdivision. So that's just
11 something that was overlooked. No recommendation was
12 made. No engineering work was done, notwithstanding
13 the requirement of the Code that special public
14 consideration by applicants, by the decision making
15 authority, be used to address those kinds of issues
16 in areas that are subject to flooding.

17 CHAIRMAN LUNDGREN: Are you maintaining,
18 Mr. Hathaway, that this area is what is called in the
19 Chapter 9 a sensitive area?

20 MR. HATHAWAY: "Sensitive" includes
21 flooding areas, but also in 16-28-040, you've got the
22 sensitive area designation. And as you pointed out,
23 Mr. Chair, in 16-04-7700, but also 16-28-010, et
24 cetera, calls out special additional considerations
25 whenever you're in one of these flood potential flood

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1 plain zones.

2 And I think it's worth noting, and I've
3 included a copy of it here, under tab Number 4, this
4 is a copy of the Earthtech Engineering work that was
5 attached as part of the proposal, as part of the
6 Development Agreement by Mr. Wilkinson. This work
7 was hired by him. And it is devoid of any
8 discussion, calculation, measurement related to the
9 potential flows coming from the Wilkinson Dam. I've
10 attached it in the event the Board would like to
11 review it to check it. It does have the typical site
12 plan, subsurface, laboratory testing, grading
13 discussions, but nothing with respect to the
14 existence of this dam up gradient from the
15 subdivision.

16 And finally, in that same regard, under
17 tab Number 2, I've included an agreement, this was
18 from the files of Morgan County, with respect to the
19 County's obligation to maintain and participate in
20 the maintenance of the Wilkinson Dam. And I've
21 provided that for illustrative purpose to show that
22 this is something of serious concern to the County
23 that seems to have been overlooked in the process
24 that's gone through with the subdivision.

25 Unless the panel has any questions, I

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1 would respectfully request that I could just have ten
2 minutes at the conclusion to make any rebuttal
3 comments after the County and the Wilkinsons have an
4 opportunity to speak.

5 CHAIRMAN LUNDGREN: You will have an
6 opportunity for rebuttal. Any questions from members
7 of the Board?

8 MR. HATHAWAY: Thank you.

9 MR. WRIGHT: Could we take five minutes?

10 CHAIRMAN LUNDGREN: We may. We'll stand
11 adjourned for five minutes.

12 (A break was taken.)

13 CHAIRMAN LUNDGREN: Ladies and gentlemen,
14 let's re-adjourn, please.

15 Mr. Wright, you may proceed.

16 MR. WRIGHT: Thank you very much. Mr.
17 Chairman, Board, I appreciate the opportunity to
18 represent the interest of Morgan County and the
19 County Council with respect to this property. I
20 would like to proceed as follows. And I am mindful
21 of the time and I will try, as the Chair has
22 indicated, not to re-invent the wheel, but there are
23 some very critical points that I would like to
24 address. I would like to have the first portion of
25 my presentation be evidence gathered. I have a few

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1 individuals that I would like to call. And then what
2 I would propose to do would be to -- I have four
3 areas that I would like you to consider. Two of them
4 are jurisdictional -- well, three of them are
5 jurisdictional and the fourth gets to the substance
6 of the merits, if we get to that point.

7 So if the Board would indulge me, I would
8 like to first call Austin Rowser to testify here.

9 CHAIRMAN LUNDGREN: Mr. Rowser.

1 AUSTIN ROWSER,
2 called as a witness, being first duly sworn, was
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. WRIGHT:

6 Q. Would you state your name and occupation,
7 please.

8 A. Austin Rowser, I am the civil engineer for
9 the County.

10 Q. How long have you been the County engineer
11 on this property?

12 A. Since May 9, 2005.

13 Q. You're a professional engineer?

14 A. Yes, I am.

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1 finished elevation of all buildings in the project.

2 Q. Are you aware of flooding concerns in the
3 past by Mr. McMillan?

4 A. I am.

5 Q. And do you know whether he has
6 communicated with UDOT with respect to those
7 concerns?

8 A. He has.

9 Q. Can you tell the Board when he may have
10 done that?

11 MR. HATHAWAY: With all due respect, if
12 we're going to be considering hearsay objections, I
13 know this goes well beyond the pale. You're asking
14 for hearsay upon hearsay, the contacts of Mr.
15 McMillan to UDOT that this witness is aware of. And
16 I object on the basis of that.

17 CHAIRMAN LUNDGREN: Mr. Wright, any
18 response to that?

19 MR. WRIGHT: Yes. This is not proffered
20 to prove the truth of the matter as to what went
21 there, but with respect to Mr. McMillan, who just
22 testified, and I guess I can call him and say, "Is
23 this your letter? Is this what you wrote?" And I
24 could do that, Counsel, if you would like.

25 MR. HATHAWAY: Sure.

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1 Q. You've sat through some of the discussions
2 and testimony with respect to the flooding issues of
3 the property that we're talking subject to property
4 at Coventry Cove?

5 A. I did.

6 Q. Were you able to, at my request, pull the
7 FEMA map?

8 A. Yes, I was.

9 Q. Would you tell the Board here whether or
10 not this particular property is in the flood plain?

11 A. This property is not located within the
12 identified flood plain by FEMA.

13 Q. In fact, do you have any information as to
14 the actual buildings, how far above any flooding area
15 that they might be?

16 A. I do. The approved construction drawings
17 for the buildings showed the finished floor
18 elevations to be approximately 4,930 feet above sea
19 level. The drainage channel that comes out of the
20 reservoir crosses the property at about 4,910; which
21 is about 20 feet lower than the finished floor of the
22 buildings. There have been some dam studies done by
23 the state of Utah that show the maximum inundation
24 with their dam failure to be 10 to 20 feet, which
25 would be below the finished elevation or at the

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1 CHAIRMAN LUNDGREN: At the risk of
2 prolonging these hearings, I think it would be
3 appropriate if you allow Mr. Rowser to continue to
4 testify. But I believe Mr. Hathaway's objection is
5 proper since Mr. McMillan is here to verify the
6 authenticity of the letter.

7 MR. WRIGHT: Then I will call Mr. McMillan
8 immediately after, just to verify this conversation.
9 Go ahead.

10 THE WITNESS: I have a letter dated June
11 21, 2005 that is signed by Mr. McMillan.

12 Q. Who is it addressed to?

13 A. It's addressed to Utah Department of
14 Transportation, District 1, Attention: Rex Harris.

15 Q. What is the general nature of the letter?

16 A. The nature of the letter is flooding
17 issues that Mr. McMillan has had on his property in
18 the past. There are some references to several years
19 in here, and the short of it is that there's an
20 existing 24-inch culvert that crosses Interstate-84
21 near the McMillan property, and that that culvert
22 does not have sufficient capacity to route storm
23 water and snow mountain runoff across the McMillan's
24 property, across the Interstate, and into the Weber
25 River. So the issue is flooding on the McMillan

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1 property, and Mr. McMillan's contention is that that
2 flooding was caused by the undersized culvert under
3 Interstate-84.

4 Q. Do you know whether there was any response
5 by UDOT to this concern?

6 A. There was a response from UDOT dated
7 August 22, 2005 from Rex Harris to Mike McMillan
8 regarding this issue. And UDOT had, in that
9 response, agreed to install additional drainage pipes
10 to alleviate the flooding issue of Mr. McMillan's
11 property.

12 Q. In any of those documents or in any of
13 your discussions, are you aware of any flooding
14 concerns that may have been impacted or affected
15 because of the Coventry Cove Development in this
16 regard?

17 A. I've had a few discussions with Mr.
18 McMillan. It seems that the bulk of those
19 discussions were regarding the Cottonwood
20 Development. I don't recall if we discussed the
21 Coventry Cove specifically regarding the flooding
22 issues on this property.

23 Q. All right. So the development proceeded
24 just immediately to the northeast?

25 A. Right.

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1 Q. All right. Is there any reference on the
2 June 21st letter to the Coventry Cove?

3 A. I don't see reference to Coventry Cove.

4 Q. All right. Thank you. Do you have --
5 well, let me just ask. Did you approve the
6 engineering with respect to the Coventry Cove
7 project?

8 A. I did.

9 Q. Did you do that based upon concerns of the
10 public?

11 A. Concerns that were expressed to me?

12 Q. Yes.

13 A. I had no concerns that were expressed from
14 the public as I was reviewing the drawing scale.

15 Q. From your standpoint, does it meet the
16 criteria that you would apply as a professional
17 engineer to have proper development?

18 MR. HATHAWAY: I would like to interpose
19 an objection. That's really the decision for the
20 panel to make, not for a witness. And I believe
21 testimony along the lines of legal conclusions are
22 improper from lay witnesses. They shouldn't be
23 substituting their judgment for that of this panel.
24 And on that basis, I would render an objection as it
25 is a legal conclusion.

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1 CHAIRMAN LUNDGREN: Mr. Wright, would you
2 like to respond?

3 MR. WRIGHT: With all due respect, he's
4 the County engineer. I'm asking from his perspective
5 as an engineer, which is expert testimony.

6 CHAIRMAN LUNDGREN: To clarify the record,
7 you're asking him for his opinion?

8 MR. WRIGHT: Yes.

9 CHAIRMAN LUNDGREN: You may proceed.

10 THE WITNESS: I didn't see any specific
11 concerns from an engineering perspective that would
12 relate to the flooding of buildings on the property,
13 no.

14 Q. In fact, you approved of the development?

15 A. I approved of the engineering --

16 Q. Of the engineering of the development.
17 Thank you.

18 MR. WRIGHT: All right. No further
19 questions. Could I call --

20 MR. HATHAWAY: May I cross?

21 CHAIRMAN LUNDGREN: Let me just interrupt
22 you, Mr. Wright, we did not make a tender to cross
23 examine when Mr. McMillan was on the stand, but I
24 think for the sake of consistency, it would be
25 appropriate if we had the cross examination so we

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1 won't be bouncing back and forth too much.

2 You may call Mr. McMillan any time you
3 please.

4 MR. WRIGHT: And I will. And I wondered
5 why I didn't have the opportunity before.

6 CHAIRMAN LUNDGREN: We were just so
7 enthralled with everything going along. We were just
8 following the program.

9 MR. WRIGHT: I understand.

10
11 CROSS EXAMINATION
12 BY MR. HATHAWAY:

13 Q. Mr. Rowser, you've been the County
14 engineer since May of this year?

15 A. Yes, sir.

16 Q. So you weren't involved at all in the
17 Planning Commission or any other entity that
18 considered this application until May of this year?

19 A. I was not.

20 Q. And you haven't been out and done any
21 engineering calculations yourself of the property;
22 have you?

23 A. I actually did some calculations regarding
24 the detention pond. There was an order that was sent
25 to me that I had done some calculations on the

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1 detention pond.
 2 Q. And that was based on the set of drawings
 3 that had been submitted, pursuant to this subject
 4 application?
 5 A. The construction drawing; that's correct.
 6 Q. You rely, don't you, in reaching your
 7 engineering conclusion, on the Earthtech report?
 8 A. The Earthtech report was a new technical
 9 investigation. We didn't base any flood or drainage
 10 issues on that.
 11 Q. Do you know where the spillway drains are
 12 on the Wilkinson property?
 13 A. It comes down a channel that goes -- it's
 14 a fairly well-defined channel that outfalls from the
 15 Wilkinson Reservoir from the dam, and it follows a
 16 very well-defined channel to the Old Highway Road and
 17 then through Mr. McMillan's property.
 18 Q. And do you know where the secondary
 19 spillway is?
 20 A. The secondary spillway is on the --
 21 Q. Where does it flow?
 22 A. It would flow into the same channel
 23 eventually.
 24 Q. You agree, though, that the secondary
 25 flow, the secondary causeway, wherever necessary

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1 culvert in its present location is adequate to handle
 2 the kinds of flows that would be anticipated in the
 3 Cottonwood subdivision?
 4 A. That's correct.
 5 Q. And even more so if those volumes were
 6 increased by reason of the Coventry Cove subdivision.
 7 A. Volumes? Volumes are not increased.
 8 Q. No, I'm just saying, you've already got
 9 the Cottonwood subdivision; correct?
 10 A. Right.
 11 Q. And you don't fault Mr. McMillan for being
 12 concerned about the flow onto his property from the
 13 Cottonwood subdivision; do you?
 14 A. I'm sorry, I'm being technical. The
 15 volumes are never increased. As Mr. McMillan pointed
 16 out, it's the flow rates that can increase, but not
 17 the volumes.
 18 Q. Well, thank you for clarifying that. But
 19 if the flow rate increased, you don't fault Mr.
 20 McMillan for being concerned about that?
 21 A. No, I sure don't.
 22 Q. And you don't fault him for being
 23 concerned about what may happen in the event the
 24 Wilkinson is stressed beyond its capacity, the
 25 Wilkinson Dam?

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because of the increased flow, would flow through the
 property that's subject to this development; correct?

A. Yes, it would.

Q. In fact, even the primary flow touches on
 this property that may not impact the residences, as
 you've pointed out?

A. Yeah.

Q. And it's true, is it not, that Mr.
 Wilkinson hasn't submitted any hydrological
 engineering based on the existence of either the
 primary or secondary spillway from the Wilkinson Dam
 as part of this subdivision application?

A. No. Not from the Wilkinson Dam, no.

Q. Now, the letters you're referring to --
 you saw the photos of Mr. McMillan's property
 flooding. You didn't live here in 1984, did you?

A. I did.

Q. Were you the engineer then?

A. No, I was not.

Q. Do you remember the floods in '84?

A. I certainly do.

Q. And do you have any reason to dispute that
 Mr. McMillan's property was flooded that year?

A. I certainly wouldn't.

Q. And you would agree that the 24-inch

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1 A. No. I don't fault him for that, no.

2 Q. And you certainly don't fault him for
 3 trying to get UDOT to increase the size of the
 4 culvert under the freeway?

5 A. Absolutely not. I think it should have
 6 been done in the first place.

7 MR. HATHAWAY: That's all of the questions
 8 I have. Thank you.

9 CHAIRMAN LUNDGREN: Mr. Hammond, do you
 10 have any questions?

11 MR. HAMMOND: No questions.

12 CHAIRMAN LUNDGREN: I have a question for
 13 you, Mr. Rowser. As pertaining to the Coventry Cove
 14 subdivision that's now platted and laid out, will
 15 that subdivision increase the affected flow through
 16 Mr. McMillan's property?

17 THE WITNESS: It will not through a
 18 ten-year event, ten-year storm. It has a ten percent
 19 chance of it occurring in any given year. So a
 20 ten-year event, it will not. A ten-year will have a
 21 minimal increase. The Coventry Cove subdivision is a
 22 very, very small percentage of the drainage base that
 23 comes through that.

24 CHAIRMAN LUNDGREN: Okay. Thank you. Any
 25 other questions?

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1 MR. VANCAMPEN: Just one. You said that
2 the study that you quoted, that none of the buildings
3 in the proposed development or, I guess, the Coventry
4 Development, would be affected by excessive flows
5 from the dam. But I think that one of these photos
6 that was shown to us before showed an extremely
7 washed out area in the place where the proposed
8 storage sheds were built. How do you justify those
9 two separate, apparently at-odds conclusions?

10 THE WITNESS: My only basis for making
11 that statement is the grades that I see on the
12 drawing. And by taking the grades, you can tell
13 which way the water will flow because it will always
14 flow downhill in the actual situation. And so when
15 the water comes out of that reservoir, it may pass
16 across an area -- I am not exactly sure as to where
17 the secondary spillway would route precisely as it
18 relates to where the storage units are. You've got
19 to understand, we don't have the -- we don't have the
20 ability to overlay those buildings exactly on where
21 the photos are taken. So I can't say for sure
22 whether or not those buildings are within that
23 pathway or not. I don't think there's any way to
24 prove that here, unless that can somehow be overlaid.

25 But the nature of the drainage basin is

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1 that all of that water will flow downhill into the
2 natural channel, which runs between the home sites
3 and the storage units through the property, and Mr.
4 McMillan's property.

5 MR. BROWN: Because FEMA doesn't have this
6 on their map, would any secondary reservoirs be on a
7 FEMA map? If one in a 100-year or 50-year flood
8 plain, as far as the secondary reservoir goes, would
9 FEMA really have any of those on their map?

10 THE WITNESS: I think they would if
11 there's a natural flood plain that leads up to the
12 bottom of the dam. What we have in this area,
13 there's not an area of an actual natural flood plain.
14 It's basically a channel. What we have in a flood
15 situation is there's a flow channel where the water
16 would go and then a flood plain is a flat surface
17 where, when the channel is insufficient to handle the
18 amount of water coming out of it, it flows into this
19 flat plain. But when we have this upper level stream
20 classification, they don't have a flood plain per se
21 because they're all routed to a direct stream
22 channel. And so I think that's why FEMA didn't map
23 it as a flood plain, because there is no actual flood
24 plain in there.

25 MR. BROWN: It's more of a channel.

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1 THE WITNESS: It's supposed to be
2 contained within that channel.

3 CHAIRMAN LUNDGREN: Is Coventry Cove in a
4 sensitive area?

5 THE WITNESS: I'm not aware of any
6 sensitive areas in the Coventry Cove area other than
7 under the actual channel itself.

8 CHAIRMAN LUNDBERG: Is there a definition
9 in the Land Use Management Code for a sensitive area?

10 THE WITNESS: There is. Actually, I take
11 that back. I couldn't find a definition, but there
12 are definitions of flood hazards or flood plains.

13 CHAIRMAN LUNDGREN: Chapter 14.

14 THE WITNESS: I'm looking at Chapter 4.

15 CHAIRMAN LUNDBERG: Chapter 28 of the Land
16 Use Management Code. Are you familiar with this
17 section of the Land Use Management Code?

18 THE WITNESS: Yes, actually, I am.

19 CHAIRMAN LUNDBERG: Are you familiar with
20 this plan?

21 THE WITNESS: Yes.

22 CHAIRMAN LUNDBERG: Are you also aware
23 that the Mountain Green Area Plan defines sensitive
24 areas in Chapter 9?

25 THE WITNESS: I was not aware of that, no.

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1 CHAIRMAN LUNDGREN: Are you aware of
2 whether or not any review was done by yourself or any
3 members of the staff regarding the sensitive area
4 nature of the Coventry Cove Development?

5 THE WITNESS: Could you repeat the
6 question?

7 CHAIRMAN LUNDBERG: Are you aware of any
8 work that you did or any other work that was done by
9 former staff regarding the sensitive area nature?

10 THE WITNESS: I can only speak for myself.

11 CHAIRMAN LUNDBERG: That's all I'm asking
12 for.

13 THE WITNESS: I didn't recognize the
14 sensitive area where the buildings were located so I
15 didn't review the sensitive area issues.

16 CHAIRMAN LUNDBERG: Okay. Thank you.
17 Go ahead, Mr. Wright.

18
19 RE-DIRECT EXAMINATION

20 BY MR. WRIGHT:

21 Q. Just for my clarification, I'm interested
22 to know whether -- I mean, the property of Coventry
23 Cove was there. The issue with flooding has to do
24 with the reservoir that is off the property, right,
25 with natural drainage coming down?

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1 A. That's correct.
2 Q. Because you've indicated the problem with
3 flooding really is the culvert, or has been --
4 CHAIRMAN LUNDBERG: I think that's the
5 issue that's historically been raised by Mr.
6 McMillan.
7 Q. (By Mr. Wright) So here's my question and
8 maybe you responded to it. There is construction of
9 storage buildings in an area historically where the
0 flow is; is that as you understand it?
1 A. I can't say for sure.
2 Q. Okay. Did you see the representation that
3 was made here as to where that flow went?
4 A. I did.
5 Q. And did you hear Mr. McMillan's comment
6 that it flowed where these buildings are to be built?
7 A. I did.
8 Q. Do you have an opinion as to whether
9 that's accurate or not?
0 A. I think I would need to evaluate that
1 further.
2 Q. Just a practical question. Without those
3 buildings, would the buildings restrict a flow if
4 such a flood occurred, if we accept Mr. McMillan's
5 representation that that's where the flow would be?

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1 A. Yes, there is.
2 Q. And is that something that you have
3 reviewed?
4 A. Yes.
5 Q. Is that something that you would approve?
6 A. Yes.
7 Q. And you did that in this case?
8 A. Yes, I did.
9 Q. And the intent was to take care of all of
10 the storm water of this development so as to not
11 affect a neighboring owner?
12 A. So as to not increase the floods to the
13 property, correct.
14 Q. Correct. And by not increasing, it did
15 not adversely affect the downgrade -- okay.
16 Thank you. No further questions.
17 MR. HATHAWAY: Mr. Chair, may I make three
18 points of clarification by examining this witness?
19 CHAIRMAN LUNDGREN: You may, Mr. Hathaway.
20 MR. HATHAWAY: Thank you.
21
22
23 RE-CROSS EXAMINATION
24 BY MR. HATHAWAY:
25 Q. To clarify one thing, Mr. Rowser, the

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A. I don't believe it would.
Q. Okay. Does it adversely affect?
A. Mr. McMillan?
Q. Yes.
A. It seems to me the danger would be to the
buildings themselves, more so than the downstream
users.
Q. So potential danger would be to the
Coventry Cove, not to Mr. McMillan?
A. If, in fact, the drainage from the
overflow does come from where those buildings are
located.
Q. Okay. So their construction would not
adversely, necessarily adversely affect Mr. McMillan,
but would potentially have an impact on those
buildings themselves?
A. That's correct. I think that the argument
could be made that the addition of that impervious
surface into the drainage basically adversely
affected downstream property owners. But, again, the
proportion of the size of that building to the
overall drainage basin is really insignificant. In
fact, negligible, in my opinion.
Q. As part of this development, is there
provision for storm runoff?

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1 culvert you're referring to is on Mr. McMillan's
2 property?
3 A. It's actually in the UDOT right-of-way.
4 Q. But it's not near the Old Highway.
5 A. Right. It's the --
6 Q. It's on the other side of Mr. McMillan's
7 pasture where the canals go beneath I-84?
8 A. That's correct.
9 Q. So we're not talking about flows coming
10 from this subdivision onto Mr. McMillan's property.
11 This is the water that accumulates on the McMillan
12 property that leaves and goes beneath the freeway?
13 A. That's correct.
14 Q. That's the culvert that you're referring
15 to?
16 A. That's correct.
17 Q. From an engineering standpoint, it's not
18 relevant, is it, to any of the flow issues on the
19 Coventry Cove subdivision?
20 A. On the flows leaving the subdivision, no.
21 But it directly affects the way that those flows are
22 routed across Mr. McMillan's property.
23 Q. But that doesn't have anything to do with
24 your decisions in regard to this subdivision; do
25 they?

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1 A. It had a direct effect on how I reviewed
2 the drainage layout of it. But you asked if it had
3 adequately contained the storm water runoff from the
4 site, so that as not to increase the downstream flows
5 in a ten-year event.

6 Q. Now, the building you referred to, and are
7 these the buildings on the photos taken a couple of
8 weeks ago that are on the Wilkinson property? These
9 aluminum buildings --

10 A. Okay.

11 Q. -- or steel buildings? I'm not sure
12 they're aluminum. Steel. Are those the buildings
13 you're referring to?

14 A. Yes.

15 Q. You would agree -- and by the way, have
16 you seen those culverts before?

17 A. Where are those located?

18 Q. I can represent to you that they go
19 beneath the road on the Wilkinson property. Have you
20 seen those before?

21 A. Are they farther south on the road; is
22 that where they're located?

23 MR. MCMILLAN: They're on Wayne's
24 driveway.

25 THE WITNESS: I'm sorry. Where is Wayne's
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1 driveway?

2 Q. (By Mr. Hathaway) Well, if you've never
3 seen it, I won't ask you.

4 A. Well, I don't want to say I've never seen
5 it because they look like 40 other culverts that I've
6 seen in the County.

7 Q. From your standpoint as an engineer, these
8 could be plugged in a 50-year storm event?

9 A. Not plugged, but it would probably
10 overflow the road if the flows were too high.

11 Q. If it was a 100-year?

12 A. I'm sure that those are not signed.

13 Q. And if a piece of steel or corrugated
14 steel were washed up against that, it would plug
15 them?

16 A. It could plug them. But in a 100-year
17 event, it's going to overflow the road anyway, so it
18 wouldn't matter.

19 Q. It would probably wash the road out in a
20 100-year event; right?

21 A. Right.

22 Q. Now, you would agree, wouldn't you, that
23 in a flood event that resulted in the kind of damage
24 that's displayed on these drawings, that a
25 prefabricated corrugated steel building could get

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1 washed away; wouldn't you agree?

2 A. I think so. Those -- what you have to
3 keep in mind that I don't think has been mentioned
4 here, I believe, if I'm not mistaken, the flood of
5 '83 and '84 was actually a 500-year event. It was
6 considered an act of God.

7 Q. You would agree, though, that if there had
8 been a corrugated steel pre-fab building located in
9 the path of where it had been cut here, that wouldn't
10 be able to stand up against that kind of pressure?

11 A. In that event, no.

12 MR. HATHAWAY: Thank you. Mr. Chairman,
13 that's all the questions I have.

14 CHAIRMAN LUNDGREN: All right. Do you
15 have anything else of this witness?

16 MR. WRIGHT: Yes. Just one.

17
18 FURTHER RE-DIRECT EXAMINATION
19 BY MR. WRIGHT:

20 Q. I'm just curious, from a professional
21 standard, when you look at a development and you
22 approve it for the public safety, health, and welfare
23 of the community and you're looking at an event time
24 frame, what event time frame did you look at?

25 A. The Code specifies a ten-year event.

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1 Q. A ten-year. All right. Thank you.
2 That's it.

3 A. Any other questions from the Board?

4 CHAIRMAN LUNDGREN: Mr. Hammond, do you
5 have any questions of this witness?

6 MR. HAMMOND: No, thank you.

7 CHAIRMAN LUNDGREN: Any questions from
8 members of the Board? Thank you. Go ahead.

9 MR. WRIGHT: Thank you. I'll call Mr.
10 McMillan, as I have promised to.

11 CHAIRMAN LUNDGREN: Mr. McMillan, you are
12 under oath.

13 MR. MCMILLAN: Yes, sir.

14
15 DIRECT EXAMINATION
16 BY MR. WRIGHT:

17 Q. Just for clarification, because it became
18 an issue, there's a letter dated June 21, 2005. Is
19 that a letter that you had prepared and caused to be
20 prepared to be sent to UDOT?

21 A. Yes, it is.

22 Q. And is there any reference to the Coventry
23 Cove in that letter?

24 A. No, not that I recall. What was the date
25 on it?

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1 Q. June 21st.
2 A. Okay.
3 Q. Okay. And it is a letter regarding your
4 concerns with the difficulty of the drainage from the
5 Bowman Hollow?
6 A. Yes.
7 Q. Was this the response that you received on
8 August the 22nd of 2005?
9 A. Yes, it is.
10 Q. Okay. Thank you. You had indicated, Mr.
11 McMillan, in your earlier testimony that you are a
12 contractor?
13 A. I am.
14 Q. And are you currently operating as a
15 contractor?
16 A. Yeah, I'm --
17 Q. And your office is located where?
18 A. In -- we're fishing for the address.
19 They've changed our office. South Jordan.
20 Q. Do you also have an office in your home?
21 A. Yes, I do.
22 Q. And that was done in when?
23 A. Years ago. I'm not sure. I'm not sure
24 when that was. I have it for a gravel pit point of
25 sale and as a general contractor. I have a

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1 back there; that is, the property subject that we're
2 talking about, the Coventry Cove?
3 A. No, he did not. He was very independent
4 and he had Rex Wilkinson build him a separate
5 building with an elevated high base to put his
6 trackhoe in. He kept his fuel tank and his equipment
7 on his property, and I never saw an intermixing of
8 the dairy and the construction business.
9 Q. All right. And what was the nature of
10 Harry's business?
11 A. He was, first of all, one of the hardest
12 workers that I ever knew, and he was an excavator.
13 And he did, like, water systems, so --
14 Q. Sewer lines?
15 A. He did sewer lines and he would do, like,
16 a pump house. Pretty much anything that was water
17 and sewer.
18 MR. WRIGHT: Okay. All right. Thank you
19 very much. That's all the questions I have.
20 CHAIRMAN LUNDBERG: Just a minute, Mr.
21 McMillan. Let's see if anybody else has questions
22 for you. Mr. Hammond?
23 MR. HATHAWAY: I have none.
24 CHAIRMAN LUNDBERG: I'm sorry. I got my
25 names mixed up. Mr. Hammond?

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conditional use for that, but I don't have the date
on that. I've been purchasing a license for those
for years and years.
Q. If I represented that it was June of
1995 --
A. That may be -- yeah. That's -- yeah. It
could -- I do not know that. If it says it is,
why --
Q. I think I'll represent that those are the
minutes.
A. All right.
Q. So you have a home occupation through your
construction business?
A. Uh-huh (affirmative).
Q. Okay. The home that's right across the
street, that is, outside of the development but
between the Cottonwoods Development and the Coventry
Cove. Do you know the home I'm talking about?
A. Chris Wilkinson's home.
Q. Chris.
A. Yeah.
Q. Is that the home that Harry Wilkinson used
to live in?
A. Yes, it is.
Q. Did he store his equipment on the property

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1
2 CROSS EXAMINATION
3 BY MR. HAMMOND:
4 Q. When did you move to your current home?
5 A. June 11, 1975.
6 Q. And was the shop in question in existence
7 at that time?
8 A. Yes, it was.
9 Q. So you don't know how the shop was used
10 prior to the time that you moved in; is that right?
11 A. I do not.
12 MR. HAMMOND: That's all I have.
13 CHAIRMAN LUNDGREN: Members of the Board?
14 I have a question for you, Mr. McMillan.
15 You testified earlier under direct examination from
16 Mr. Hathaway that you had observed business goings-on
17 or lack of business goings-on around the shop area.
18 THE WITNESS: Yes.
19 CHAIRMAN LUNDGREN: How could you tell
20 whether the people coming and going were associated
21 with construction work or not?
22 THE WITNESS: Because they were farmers.
23 I know them, who they were specifically from, you
24 know, I know every person that worked there. And
25 they always had larger tractors than I did, so I was

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1 always very jealous of engines they were changing and
2 mechanical stuff. So when I would go pick my mail
3 up, if their doors were open, quite often I would go
4 over to see what kind of powerhouse Max was building.
5 And so I would go there a lot.

6 CHAIRMAN LUNDGREN: Can you help us
7 understand what you mean by "a lot"? Weekly?

8 THE WITNESS: I probably -- no. Yeah. I
9 probably visited there more than once a week. You
10 know, I don't know if it would average two a week.
11 I'm under oath, but it's for sure more than once a
12 week. And I know from the 806 that had the hydro,
13 right down to the 671 Detroit that he put in the
14 Case. I spent a lot of time in there and it was
15 really interesting.

16 CHAIRMAN LUNDGREN: And any of the
17 equipment you observed in there, did it have a
18 construction-oriented purpose?

19 THE WITNESS: The only time I ever saw
20 that is one time Max was welding Harry's Allis
21 Chalmers backhoe for him. And then another time they
22 were working on the undercarriage on a little Cat. I
23 have Cats, so when they got the tracks off, I wanted
24 to go see what caused it, you know. And that's the
25 only two times that I can recall that any of Harry's

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1 equipment -- his fuel and everything, his whole
2 operation was extremely independent. It was never on
3 that since I lived there.

4 CHAIRMAN LUNDBERG: Now, the question does
5 not go to Harry's operation; it goes to the operation
6 in the shop.

7 THE WITNESS: Oh, the operation in the
8 shop was strictly the dairy.

9 CHAIRMAN LUNDBERG: Okay. And since 1975,
10 have you seen building materials stored there in the
11 vicinity at the shop, or in the shop?

12 THE WITNESS: I've seen out in front of
13 the shop, once they unloaded a truck with pipe, you
14 know, set it off. But not in the -- I never really
15 saw anything in the shop. If it was, it was small
16 enough -- there's no partitions or anything in the
17 shop. He had an airplane engine hanging from the
18 rafters, which was pretty unique, until -- it was
19 just always hanging there since I moved there.

20 But no, I never saw anything. My mail box
21 was there, you know. I walked up the day that Damian
22 rode his bike out in front of the Ford station wagon.
23 I thought he would die right there. All of those
24 years we had a very close understanding of what
25 happened there.

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1 CHAIRMAN LUNDBERG: Any other questions
2 from the Board? Mr. Wright?

3
4 RE-DIRECT EXAMINATION

5 BY MR. WRIGHT:

6 Q. If I can answer just one last question so
7 I won't have to call Sherrie. Can you tell me when
8 the Land Use Management Code was first put into place
9 in Morgan County?

10 A. In 1964.

11 Q. You, in fact, served on the Commission for
12 a number of years?

13 A. The current one was signed by Jan Turner
14 in 1998.

15 Q. Correct. But it was 1964 that -- and
16 prior to that, there was no zoning regulation?

17 A. Correct.

18 MR. WRIGHT: Okay. That's all I have.
19 Thanks.

20 THE WITNESS: Thank you very much.

21 CHAIRMAN LUNDBERG: Just a minute, Mr.
22 McMillan. I'm sorry, I should think a little faster
23 here. Were you on the Council when the Land Use
24 Management Code was adopted in 1964?

25 THE WITNESS: No. I was just trying to

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1 get another date with my wife back then. The -- no.
2 It was done by Frank Mowan and Paul Turner, were the
3 main initiators of it. And those gentlemen are all
4 in their eighties, if they're still here now.

5 CHAIRMAN LUNDBERG: Do you have personal
6 knowledge of any policies that Morgan County had at
7 that time regarding pre-existing businesses or
8 operations once the Land Use Management Code was
9 adopted? Was there an ordinance enacted to treat
10 those in any particular way or a particular policy
11 that was followed?

12 THE WITNESS: The state legislature moved
13 in 1962, I believe, to require, because of
14 development that was occurring principally on the
15 Wasatch Front, and passed law that said that each
16 county had to develop a Land Use Code; and in their
17 failure to do so, that the State would come forward
18 and provide it for them. And it took two or three
19 years for that to trickle down. And so then all
20 counties came forward, produced those codes. And as
21 a part of those codes, all of them that I have ever
22 read, they discussed at length on, you know,
23 grandfathered operations, and what, you know, the
24 intricacies -- the legislature was concerned, as
25 these came in, that those uses that pre-dated that

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1 were accepted. They were bonafide uses because there
2 was no zoning.

3 CHAIRMAN LUNDGREN: And did Morgan County
4 adopt that type of policy, to your knowledge?

5 THE WITNESS: I've read, year in '64. It
6 has language when they did that, that those uses --
7 you know, if you were an excavator then or an
8 electrician or whatever, they had to accept signs,
9 they had to accept all of those uses that existed at
0 the time of implementation of the Code.

1 CHAIRMAN LUNDBERG: And I understand that
2 you have been a County Commissioner; is that correct?

3 THE WITNESS: Yes.

4 CHAIRMAN LUNDBERG: And if I can use that
5 as a basis for asking the following question: Is it
6 your opinion that if Mr. Wilkinson's shop had been
7 used in a commercial nature up until 1964, that it
8 would have been allowed as a nonconforming use under
9 the new Land Use Management Code?

0 THE WITNESS: Absolutely. If it -- since
1 it wasn't in existence, that would be difficult. But
2 had it been in existence, unless I am misunderstand-
3 ing your question. Mr. Wilkinson, his operation
4 was -- you know, it pre-dated the Code. But not this
5 building or operation.

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1 not in existence in 1964?

2 THE WITNESS: It was not. It was built in
3 conjunction with the dairy at the same time, in 1971.
4 And from the time it was built, this particular
5 building, from '75 it was never used as a base of
6 contracting. Mr. Wilkinson's use as a contractor on
7 other parts of his farm, or the fact that he was, you
8 know, a contractor from 1947, he was grandfathered in
9 his use. But not to use that structure, because it
10 didn't exist. It didn't have a time frame that it
11 could be accepted, the use of it, because it wasn't
12 built yet.

13 CHAIRMAN LUNDBERG: Any other questions?

14 MR. BROWN: When we were on Planning and
15 Zoning, we dealt with grandfather clauses in some
16 cases, and we were told that you could only
17 grandfather exactly what they had. If they expanded
18 those, you couldn't grandfather.

19 THE WITNESS: That's right.

20 CHAIRMAN LUNDGREN: And I believe that to
21 be correct.

22 MR. VANCAMPEN: Sir, this is a question
23 that has occurred to me as I've sat here and listened
24 to you, so I apologize if it's going in a completely
25 different direction.

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CHAIRMAN LUNDGREN: I'm going to ask that
one more time.

THE WITNESS: Okay. Make it simple. I
can tell that we're not communicating right.

CHAIRMAN LUNDBERG: I think I understand
what you said, and let me rephrase it. You tell me
whether I understand it correctly.

THE WITNESS: Okay.

CHAIRMAN LUNDBERG: Did you say that if
Mr. Wilkinson's operation in 1964 was commercial,
that the Land Use Management Code would have
continued to allow it as a legal, nonconforming use?

THE WITNESS: If it were predating the
Code, it would be a legal, nonconforming with no
ability to be expanded. But in this situation --

CHAIRMAN LUNDGREN: Well, just answer my
question.

THE WITNESS: Okay. That's correct. And
then what happens is legal, nonconforming would take
a conditional use permit and review to ever expand or
alter or remodel.

CHAIRMAN LUNDGREN: Okay. Council? Board
members?

MR. MULLEN: Is it your contention, then,
the shop building we're talking about here was or was

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1 THE WITNESS: It's probably from me not
2 answering very well.

3 MR. VANCAMPEN: I just want to know if,
4 during the course of all of the hearings and public
5 comment periods leading up to the approval of this
6 subdivision, did you avail yourself of the
7 opportunity to address your concerns during those
8 public comment periods or previous hearings? And if
9 yes, were your concerns addressed by the Planning
10 Commission and the County Commission?

11 THE WITNESS: I addressed some issues. I
12 think that one thing that may mount is why am I
13 concerned about the flooding now if it wasn't brought
14 up then? The reason is, I had no idea that he would
15 build a building across the spillway. As soon as
16 that occurred, then, you know, I exhibited my
17 concern. I had no idea that the plan -- this plan
18 has a five-foot cusp at the neighbor's property line.
19 So the spillway that comes around initially drops
20 five feet. The hydraulics are not -- it's not
21 possible to do that. And the buildings nearly span
22 the entire wash. When I saw that happen, since it
23 has flooded twice since '84, I realized the buildings
24 could not sustain that. And that's why I -- but I
25 did bring certain issues up, and then I saw that it

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<p>SHEET 13</p> <p>1 became politically and emotionally very complicated. 2 And so I retained Mr. Hathaway to approach the 3 Council with those concerns, and we didn't really get 4 that done. I attempted to do that. 5 There is Ordinance 182 that makes it -- if 6 there's a question of that nature, that you can go 7 out to outside experts on some of these projects that 8 it would be appropriate for. 9 MR. VANCAMPEN: So I guess my follow-up to 10 that would be what time frame, then, did you do that, 11 as far as retaining Mr. Hathaway and exploring that? 12 THE WITNESS: I did that prior to the 13 final approval. 14 MR. VANCAMPEN: Were your concerns 15 addressed prior to final approval? 16 THE WITNESS: No, they were not. 17 MR. VANCAMPEN: Okay. Thank you. 18 CHAIRMAN LUNDGREN: Any other questions? 19 Mr. Wright, go ahead. 20 21 22 FURTHER RE-DIRECT EXAMINATION 23 BY MR. WRIGHT: 24 Q. The only other question I have is, is your 25 property RR-1?</p> <p style="text-align: right;">97</p>	<p>1 Q. Okay. The home occupation, the 2 construction business was RR-1 -- 3 A. No, it's A-20. 4 Q. But the minutes reflect otherwise. 5 A. I can't help it. It's their maps and I 6 believe that the maps show A-20. And the house has 7 been there since 1928. 8 MR. WRIGHT: No further questions. 9 THE WITNESS: It's 900 feet off the road. 10 CHAIRMAN LUNDBERG: Just a minute, Mr. 11 McMillan. 12 Mr. Hathaway, any follow-up? 13 MR. HATHAWAY: No, I don't. 14 CHAIRMAN LUNDBERG: And, Mr. Hammond? 15 MR. HAMMOND: No, thank you. 16 CHAIRMAN LUNDBERG: Any further follow-up? 17 Thank you, Mr. McMillan. 18 MR. WRIGHT: Sir, I would call Mr. Blair 19 Larson. 20 21 22 BLAIR LARSON, 23 called as a witness, being first duly sworn, was 24 examined and testified as follows: 25</p> <p style="text-align: right;">99</p>
<p>1 A. I believe that -- I'm not sure, right by 2 the barn. We have a gravel pit permit on the rest 3 and we zoned from RR-1 back to A-20, so that the 4 whole piece was A-20. And the one thing that 5 happened in setting the maps out is the County has 6 never had the financial means yet to do good maps. 7 Okay? The original set of water colored maps are 8 here, and I do not know if by my barn, for the 400 9 feet that's there, if that little piece is our RR-1 10 or not. The rest of it, down to the school property 11 that I bought, is all A-20. But I do not know -- 12 Typically what they did was get in the 13 pickup truck and drove down the road. If the ground 14 was flat enough to develop, they would call it RR-1. 15 As soon as it was steep, Rex Wilkinson's house and 16 headed around to Peterson, all of that was A-20 17 because it was too steep to build on. 18 Now, subsequent to that, the Planning 19 Commission -- 20 MR. WRIGHT: With due respect, this is not 21 responsive to my question. I would object. 22 CHAIRMAN LUNDGREN: And that's fine. You 23 may continue, Mr. Wright. 24 Q. (By Mr. Wright) All right. I just -- 25 A. Without looking at the map, I don't know.</p> <p style="text-align: right;">98</p>	<p>1 DIRECT EXAMINATION 2 BY MR. WRIGHT: 3 Q. Would you tell us your name and where you 4 live. 5 A. Jay Blair Larson. I live in Mountain 6 Green. 7 Q. How long have you lived in the community? 8 A. My folks built the home that I now live in 9 when I was 11 years old. So 41 years. 40, 39, 10 something like that. 11 Q. Okay. All right. I would like you to 12 provide whatever insights you have with respect to 13 the use of the property that we're talking about 14 here, what you know about it. 15 A. I was a little tyke. Well, compared to 16 what I am now. But when my folks built the house, 17 Harry Wilkinson come and put the -- I believe he 18 still had that 918 Allis Chalmers, and he put our 19 water line in, and he dug our drain field, put our 20 septic tank in. 21 As my dad worked for the Highland Water 22 Company, there's many times during the years that he 23 would call Harry to come over and fix water leaks. 24 And, you know, I know that several -- many, many 25 water lines and lots of stuff that's been done.</p> <p style="text-align: right;">100</p>

1 Being a youngster, I really liked watching the big
2 equipment move and I watched Harry a lot. And I can
3 remember his equipment being parked all over up
4 there.
5 Q. About "up there," are you talking --
6 A. On what is Chris's place now. But where
7 Harry's house was and down below, he had stuff all
8 over the place.
9 Q. And when you say "down below," you're
0 referring to the Coventry Cove?
1 A. To the Coventry Cove, yeah.
2 Q. All right. And that stuff being parked
3 all over, you're talking about the construction
4 equipment and that type of equipment?
5 A. Yes.
6 MR. WRIGHT: Okay. Thank you very much.
7 That's all I have.
8 MR. HATHAWAY: I have no questions.
9 CHAIRMAN LUNDGREN: Mr. Hammond?
0 MR. HAMMOND: No.
1 CHAIRMAN LUNDGREN: Just a minute, sir.
2 We get to ask you some questions, too, if that's all
3 right.
4 THE WITNESS: Sure.
5 CHAIRMAN LUNDGREN: Mr. Wright or Mr.

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1 area, there was equipment over in there nipping away
2 at gravel here and there and everything from time to
3 time.
4 CHAIRMAN LUNDGREN: And I just want to
5 make sure I'm absolutely clear on what you are
6 saying, sir. So you're saying that prior to 1971, or
7 whatever the date the shop was built, Harry Wilkinson
8 kept construction equipment at or near where the
9 location of the shop is today?
10 THE WITNESS: I've seen it parked there.
11 CHAIRMAN LUNDGREN: And after the shop was
12 built, the nature of the use of the shop changed to
13 primarily support for agriculture and dairy?
14 THE WITNESS: I -- my memory, as Mike was
15 talking there, I think that's probably right. You
16 know, Mark moved in there, or Max, I mean. And
17 farmed. And I know Harry then built him another
18 place behind his house where he kept his stuff.
19 CHAIRMAN LUNDGREN: And when did he build
20 that place behind his house?
21 THE WITNESS: I don't know.
22 CHAIRMAN LUNDGREN: Before or after the
23 dairy was built?
24 THE WITNESS: I am not sure. I have a
25 thought, but, you know, it would be speculation.

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Hathaway, would you put up the map that shows the
subdivision layout for Mr. Hathaway, please, and
place it so the witness can see that.
Mr. Wright, are you familiar with this
property?
MR. WRIGHT: You're asking me?
CHAIRMAN LUNDBERG: Yes, sir.
MR. WRIGHT: Yes.
CHAIRMAN LUNDBERG: Can you point out that
map where the shop is located, and point out where
Mr. Harry Wilkinson's house used to be? And can you
see that, Mr. Larson?
THE WITNESS: Uh-huh (affirmative).
CHAIRMAN LUNDGREN: Okay. Where the shop
is currently located, what is your experience with
the nature of business that was conducted in that
shop?
THE WITNESS: Well, I think Mr. McMillan
hit it on the head. After the shop was built, you
know, I think -- the time period I'm talking about, I
think Mark Wilkinson actually lived over there where
Ree Larding lives, and then at whatever time the
dairy got built and that shop was built, then I think
that, you know, the use changed. But I know that
down there where the shop is and all of that flat

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1 CHAIRMAN LUNDGREN: Understanding that
2 it's speculation, give us your best guess.
3 THE WITNESS: I think it probably came --
4 just thinking through things, it probably came, you
5 know, Harry -- it probably came -- I don't know. To
6 tell you the truth, I don't know.
7 CHAIRMAN LUNDGREN: Okay. That's fine.
8 THE WITNESS: It came after.
9 CHAIRMAN LUNDGREN: It came after?
10 MR. WILKINSON: Yes.
11 CHAIRMAN LUNDGREN: Thank you, sir.
12 MR. BROWN: I think the underlying
13 question here, I'm a little confused, is that there's
14 equipment being parked. Was there an office? Was
15 there a payroll there? Was there a phone there for a
16 construction company? Was there a computer?
17 THE WITNESS: Not in '71.
18 MR. MULLEN: Ask Mr. Larson that question
19 or someone at an appropriate time, to someone who may
20 be --
21 MR. BROWN: Yeah. Maybe it's not fair to
22 Blaire.
23 THE WITNESS: Well, there wouldn't be
24 anything in that building prior to when it was built.
25 But when Burrell and Elizabeth owned Mike's property,

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1 I do not think that there was any conditional use for
2 an electrical business, either.

3 CHAIRMAN LUNDGREN: Any other questions?
4 Any other response to this current testimony?

5 Mr. Hathaway?

6 MR. HATHAWAY: No, thank you.

7 CHAIRMAN LUNDGREN: Mr. Hammond?

8 MR. HAMMOND: No.

9 CHAIRMAN LUNDGREN: Mr. Wright?

10 MR. WRIGHT: No, thank you.

11 CHAIRMAN LUNDGREN: Go ahead.

12 MR. WRIGHT: Thank you, Mr. Larson.

13 We would call Mr. Rex Wilkinson to the
14 stand.

15
16 REX WILKINSON,
17 called as a witness, being first duly sworn, was
18 examined and testified as follows:

19
20 EXAMINATION

21 BY MR. WRIGHT:

22 Q. Would you state your name.

23 A. Rex Wilkinson.

24 Q. And you're the developer of the Coventry
25 Cove?

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1 A. At the time that I went in there for
2 application, and some of you here are probably going
3 to remember this, that there was an existing dairy at
4 that time. And also, after Max left, there was
5 vacant buildings. And what we wanted to do was
6 utilize those buildings for storage sheds and then
7 put the eight-plexes down on the bottom. The
8 planning engineer suggested at this time that we use
9 the PUD ordinance. I reviewed that ordinance, it was
10 used in that book that Mike and Jan signed, and it
11 would allow industrial, commercial, and residential
12 in that ordinance there. And we had everything,
13 other than the industrial, in that particular plot.
14 We thought that it was a good mix and that we would
15 get the affordable housing that I was after, plus we
16 could utilize those buildings.

17 Q. Do you remember some of the discussion
18 during this process that the PUD, which is
19 contemplated by the ordinance, did not have a
20 mechanism --

21 A. That's right. When we got into the
22 ordinance and he presented it to the Council, or the
23 Planning Commission and the Council, it was their
24 conclusion that there was enough in that document to
25 make it work. Then we commenced to have the big

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1 A. That's correct.

2 Q. Do you remember how long ago you started
3 this process?

4 A. That's almost beyond memory. It was
5 somewhere -- we started initially -- when was it?
6 2002, something like that. Was it 2001? I can't
7 tell you, but it's been a long time ago --

8 Q. Okay.

9 A. -- that we actually started it.

10 Q. It's been several years.

11 A. Yes.

12 Q. Do you have the actual time?

13 MS. CHRISTENSEN: I have the file, if you
14 would like it.

15 MR. WRIGHT: Sure.

16 THE WITNESS: I think it was 2003
17 sometime.

18 Q. (By Mr. Wright) In your parcel of
19 property, did you want to have a mixed use of that
20 property?

21 A. Yes.

22 Q. And as you went in and talked with the
23 planning office, what was the toller that was
24 recommended or suggested for use, to accommodate
25 mixed use of this property?

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1 delay, and they rewrote the Code on the PUD ordinance
2 in the middle of my application. And it was not a
3 happy time, but...

4 Q. And that took a period of time before that
5 ordinance was put into place?

6 A. Pardon? Yes. And we were relying on the
7 first ordinance, which Jan and Mike put together, or
8 the commissioner signed of the original PUD
9 ordinance. And most PUDs since that time are
10 basically the same thing as what they had in that
11 first -- you could have the three areas. And that
12 was the reason why we had that. We wanted to do
13 that. And it was mainly from the suggestion of the
14 county planner that we went that route.

15 Q. All right. Now, let me ask you, as we
16 have talked about how long ago it was that you were
17 involved in this, and you don't have a recollection
18 other than it was a number of years; is that correct?

19 A. Yes. That's correct.

20 Q. Okay. I'm going to show you a document
21 that's been dated February 11, 2002.

22 A. Okay.

23 Q. Just look at that. And I don't know if
24 this is something that you remember.

25 CHAIRMAN LUNDGREN: Mr. Wright, may I

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1 interrupt, please --
 2 MR. WRIGHT: Sure.
 3 CHAIRMAN LUNDGREN: -- and impose a
 4 question. I think we are all very familiar with the
 5 many years and countless hours that the Wilkinsons
 6 spent on this. Can you tell me what the relevance is
 7 for this long history to what the final decision was?
 8 MR. WRIGHT: Actually, yes. Because one
 9 of the defenses that we're going to raise is a
 10 defense of laches. I want to show the prejudice
 11 that's associated with this, the time and costs
 12 that's been involved in going through this process,
 13 and the impact that it would have on Mr. Wilkinson
 14 with respect to his finances.

CHAIRMAN LUNDGREN: And how does that tie
 in with whether or not the actions of the County
 Council, in issuing the final approval, were or were
 not in conformance with the Land Use Management Code?

MR. WRIGHT: The issue is going to be what
 was there existing back in 1971, and prior to that,
 and what has gone forward goes directly to the issue
 of whether a grandfathered use is appropriate as we
 have it, as that decision indicates.

CHAIRMAN LUNDGREN: And I would agree with
 you on the issue of the grandfathering statute, but

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1 Wright has raised is he is claiming, or Mr. Wilkinson
 2 is claiming, that a legal issue known as laches
 3 applies to this case. The legal issue of laches -
 4 and, Counsel, please jump in if I don't express it
 5 properly - relates to the fact that he has relied
 6 upon the actions of the County in bringing his
 7 development forward. And it now, at this late date,
 8 it's inappropriate to reverse those actions that are
 9 applying to him. Is that a correct assumption, Mr.
 10 Wright and Mr. Hathaway?

MR. WRIGHT: That is correct. My
 11 understanding both on laches and estoppel, which
 12 we've raised, that we have to bear the burden, since
 13 we are raising it in the defense, to show that he was
 14 injured. And that's what I'm attempting to do with
 15 the time, with the costs, and everything that is
 16 associated with that.

CHAIRMAN LUNDGREN: Mr. Hathaway?

MR. HATHAWAY: I find it remarkable that
 18 the County is raising the claim of laches against
 19 whom? Itself? If anybody has delayed the process,
 20 it's the County. Further, estoppel, the only --
 21 under Utah law, it is clearly established in the
 22 Supreme Court law, the only way you get estoppel
 23 against a government entity is if it's fraud.

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Mr. McMillan has appealed the decision from May of
 this year, not the prior history. So if you will, in
 the interest of time, if you can go over his damages,
 we will certainly permit that. But if you can
 concentrate more on the legal issue of whether or not
 the shop was properly grandfathered and the issues
 that relate to the final order from the County
 Council, we would appreciate that.

MR. HATHAWAY: Mr. Chair, if it will
 expedite, we'll stipulate that it's been many years
 and he's expended considerable efforts, if that moves
 things along.

CHAIRMAN LUNDGREN: And thank you, Mr.
 Hathaway. I think it's common knowledge here that
 the Wilkinsons have been drug through this process
 way too long, and we certainly know they have
 incurred a lot of damages, in terms of lack of use of
 the property and money that they've spent. And if
 you want to bring that --

MR. WRIGHT: If you will stipulate to
 that, as it relates to the issue of laches, I'm
 through.

CHAIRMAN LUNDGREN: All right. Well,
 before we let you rest on that, I don't have
 authority to grant you that wish. The question Mr.

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1 There's no evidence of fraud. And, again, how is it
 2 the County is raising laches and estoppel?

My stipulation was we'll expedite the
 4 hearing, we'll concede that Mr. Wilkinson has spent
 5 many years in the process and a lot of money. But
 6 not as it relates to laches or whatever argument that
 7 the County feels like it needs to make, because,
 8 frankly, those arguments are in apsis; especially as
 9 raised by the County. And, you know, we can address
 10 -- I'll talk about other legal concerns about rights
 11 and about anything that may have accrued and
 12 benefited, and I'm happy to do that in our closing.
 13 But we'll stipulate, to move this thing along, that
 14 it's been many years and I'm sure Mr. Wilkinson and
 15 his wife have spent a lot of money. But that's the
 16 extent of our stipulation. We're not going to
 17 stipulate the laches or estoppels or anything else.

MR. WRIGHT: And has lost, during the
 18 process, beneficial use.

CHAIRMAN LUNDGREN: What I'm suggesting,
 20 Mr. Wright, if you're comfortable with this, based
 21 upon what Mr. Hathaway has expressed, if you'll
 22 simply bring out those facts as succinctly as
 23 possible. Not, that we're trying to take away from
 24 the Wilkinsons their right to express themselves, but

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1 I think it's within a narrow scope that you're going
2 to apply that information.

3 MR. WRIGHT: I will do that, because
4 they've raised the issue of grandfathered use. As
5 part of the argument is going to be, if it's been
6 around for a long time, you should have raised this
7 issue a long time ago. And because it hasn't been
8 raised, you should be precluded from raising it, from
9 making it an issue here. That's where we're headed.
10 I will proceed as you've indicated.

11 CHAIRMAN LUNDGREN: Thank you, sir.

12 Q. (By Mr. Wright) That document is 2002?

13 A. Yes.

14 Q. A conditional use permit for the property.
15 There's an affidavit that was prepared as part of the
16 Development Agreement. Are you familiar with that?

17 A. Uh-huh (affirmative).

18 Q. Okay. You signed that affidavit that was
19 prepared under your direction with the information
20 you provided?

21 A. Yeah.

22 MR. WRIGHT: And on this issue, I would
23 like the Board to be succinct and just ask any
24 questions the Board may have with respect to the use
25 of the property that we believe is grandfathered

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1 time, and that's the shop that he worked out of. And
2 so to say that it isn't grandfathered -- and he
3 worked out of that shop -- Max tore it down a few
4 years ago, I don't know just exactly when. But it
5 was in existence for a long time. And Dad worked out
6 of that shop more than he did the one down there.
7 And he stored his pipe on the property. I'm sure Don
8 can testify to what he -- there was pipe in those
9 buildings and around that -- I mean, obvious evidence
10 that Dad was in the construction business. I mean,
11 it's silly to say that he wasn't.

12 Q. You have a statement in Paragraph 3, right
13 about the middle, it says, "The construction business
14 itself has been ongoing on this property since the
15 1940s."

16 A. That's correct.

17 Q. And that's your understanding. That's
18 your testimony.

19 A. Well, yeah, since 1947, when Dad bought
20 the place.

21 Q. Okay. And the use has continued
22 uninterrupted to the present?

23 A. Well, we've had the water company, that's
24 part of the construction business, the water company.
25 We just barely moved the pipe off of from where Chris

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1 appropriately and as an appropriate part of this
2 development.

3 CHAIRMAN LUNDGREN: Actually, Mr. Wright,
4 I think the Board would appreciate it if you would
5 make the initial foray under this area and get Mr.
6 Wilkinson's testimony on record and let us respond.

7 MR. WRIGHT: All right.

8 Q. (By Mr. Wright) Let me just have you
9 take a look at the affidavit and we'll try to speed
10 this along. Let me have you focus on Paragraph 3.
11 This is information that you provided into the
12 affidavit with respect to the grandfathered use of
13 the shop; is that --

14 A. Okay. What we've got -- we've got to do
15 on this is -- I wish my mother was here to explain
16 how Dad took care of his business. Because as it's
17 been stated, he had machinery all over the place. I
18 mean, it was -- he had a junky yard. And many of you
19 can remember that that has lived in the valley. It
20 was junky.

21 Q. And did that include the property that's
22 the subject here, the Coventry Cove property?

23 A. Yes. And much of that, right where Lot 18
24 is in the Coventry Cove, he had an additional shop.
25 And this shop had been there since my grandfather's

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1 bought the property there, to another piece of
2 property, so we had storage on the farm. I mean,
3 yeah, the water company -- the thing that you're
4 probably not understanding is that it wasn't just the
5 construction business that was located out of there,
6 it was the water company that was located out of
7 there; Dad's business was there, and the farm and the
8 dairy were there.

9 And in the dairy, I'm not sure Mike can
10 remember this, but there was actually an office in
11 the dairy that I used before I left for Minnesota.
12 And that's where we -- and we were all in business
13 with the farm, construction, and the dairy. And my
14 reason for leaving the dairy was the fact that they
15 were trying to cost out all of the costs of the
16 construction and the farm to the dairy, and the dairy
17 wasn't carrying it. And so that was the reason why.
18 Now, what they did after that time while I was in
19 Minnesota, I don't know. But there was an actual
20 office in the barn that we conducted our business out
21 of.

22 MR. WRIGHT: All right. Thank you very
23 much. Does the Board have any questions along this
24 line?

25 CHAIRMAN LUNDGREN: I think before the

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1 Board makes any inquiries, it would be appropriate to
2 give Mr. Hathaway and Mr. Hammond a chance. And, Mr.
3 Hammond, I understand he's your client. And we will
4 reserve the right for you to call him as part of your
5 case in chief if you want. But if it seems
6 appropriate to carry on his testimony now, it might
7 shorten up the time.

8 Mr. Hathaway?

9 MR. HATHAWAY: Thank you.

1 CROSS EXAMINATION

2 BY MR. HATHAWAY:

3 Q. Mr. Wilkinson, when did you go to
4 Minnesota?

5 A. I left there in '72.

6 Q. And you moved to there in '72?

7 A. That's right.

8 Q. And when did you move back to Utah?

9 A. In '76.

10 Q. So for four years you were gone?

11 A. That's correct.

12 Q. And you said you don't know what was being
made of the property?

13 A. I knew. I visited. I knew that the
construction business was still going and that the

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dairy was still going.

Q. Well, in your affidavit --

A. Obviously we didn't go there and stay
there for the full duration.

Q. In your affidavit that you signed under
oath on May 8, 2005, we're got it blown up right here
and we'll all read it together. Paragraph 3.

MR. WRIGHT: You mean the 18th?

MR. HATHAWAY: Thank you. May 18, 2005.

So after the final approval was received, in
Paragraph 3 you say, "The shop has been in existence
since 1971." The shop you're referring to is the
shop that you now want to use for a construction
business?

A. That's correct.

Q. You want to grandfather that in.

A. What I'm talking about in this affidavit
was the property. That's the property that I bought,
the whole ten acres, or nine acres, on that property
was a grandfathered use. The shop was not used for
building houses. I'll admit that.

Q. You're familiar of the use to which the
shop and the surrounding property has been used; that
is, you just said you're not sure what went on from
'72 --

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1 MR. WRIGHT: Objection. That
2 mischaracterizes his statement. He said he visited
3 and he understood the business to be going on.

4 CHAIRMAN LUNDGREN: Mr. Hathaway, why
5 don't you ask the question to clarify what his
6 testimony was.

7 Q. (By Mr. Hathaway) Did I misunderstand
8 you? When you were asked when you left the property,
9 you volunteered, "I moved to Minnesota. I don't know
10 what happened on the property after that." Did I
11 misunderstand a portion of your testimony?

12 A. Well, I don't know how they used the
13 property as far as the offices were concerned. If
14 they continued to use the office for construction, I
15 have no idea.

16 Q. All right. Now --

17 A. But I do know that Dad continuously used
18 his house as an office.

19 Q. His house isn't located where the shop is.
20 You're referring to --

21 A. It's on that property.

22 Q. It's not located in the location that the
23 shop is that you're referring to in Paragraph 3.

24 A. No.

25 Q. Is your testimony that there, in fact, has

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1 been residential construction and a small commercial
2 construction company going on in that shop? Is that
3 what your testimony is here today?

4 A. Small commercial? It certainly is.

5 Q. Residential.

6 A. Well, yes. Dad worked on residential
7 stuff. That was his prime -- he did the septic tanks
8 and drain fields that have been testified to. It was
9 small commercial. I don't know how else you could
10 classify it.

11 Q. But that was up at his house, that wasn't
12 at his --

13 A. No. He used the shop. He used the shop.
14 He said he did. But the thing with my dad was that
15 if he had to move Max's machinery, he would rather
16 work outside of the shop. And a lot of it he did
17 outside of the shop. And he owned that shop. He
18 owned part of that shop.

19 Q. Mr. Wilkinson, you're confusing. Okay.
20 The shop was built in 1970?

21 A. That's right.

22 Q. Now, before then, your testimony was,
23 wasn't it, that your father had equipment all over
24 the property?

25 A. That's right. He also had shops. He had

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1 another shop and some sheds up there.
2 Q. And they built it in 1971, it was used for
3 the dairy. Did I misunderstand your prior testimony?
4 A. It was also used for the construction.
5 Q. And you're testifying that the plumbing
6 that was described earlier by Mr. Larson, and what
7 you described also as plumbing, that's what you're
8 referring to when you say residential and small
9 commercial construction. That's your testimony?
10 A. Yeah, sure.
11 MR. HATHAWAY: That's all the questions
12 that I have.
13 MR. HAMMOND: No questions.
14 CHAIRMAN LUNDGREN: Does the Board?
15 I have a few questions for you, sir.
16 CHAIRMAN LUNDGREN: In 1971, was the
17 business that was being run from this area your
18 father's business?
19 THE WITNESS: Yes, it was. They were --
20 my brother, when I left -- well, that was actually --
21 it was built -- did I leave in '70 or '71? The shop
22 was not built when we left. So we must have left --
23 or I don't know, but the shop wasn't built when I
24 left.
25 CHAIRMAN LUNDGREN: It was or it was not?

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1 correctly when you said that the office was in the
2 dairy?
3 THE WITNESS: That's correct.
4 CHAIRMAN LUNDGREN: And he just generally
5 stored equipment all over the property?
6 THE WITNESS: Uh-huh (affirmative).
7 CHAIRMAN LUNDGREN: At what time was an
8 office moved into the shop?
9 THE WITNESS: When I bought the shop.
10 CHAIRMAN LUNDGREN: In which year was
11 that?
12 THE WITNESS: And that was -- well, after
13 I had applied for the application or something. It
14 was a couple of years ago.
15 CHAIRMAN LUNDGREN: And can you describe
16 for us what's inside of this shop at the time you
17 purchased it.
18 THE WITNESS: Right now? The way we've
19 done it?
20 CHAIRMAN LUNDGREN: No. At the time you
21 purchased it.
22 THE WITNESS: Oh, at the time.
23 CHAIRMAN LUNDGREN: And I assume no
24 changes were made immediately prior to you acquiring
25 it.

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1 THE WITNESS: It was not.
2 CHAIRMAN LUNDGREN: It was not. Do you
3 know whether or not your father obtained a building
4 permit for the shop?
5 THE WITNESS: I have no idea.
6 CHAIRMAN LUNDGREN: Do you know if he
7 obtained any sort of conditional use approval for the
8 shop?
9 THE WITNESS: I don't.
10 CHAIRMAN LUNDGREN: Do you know if he ever
11 received conditional use approval?
12 THE WITNESS: I don't have any idea. Like
13 I say, I was in Minnesota.
14 CHAIRMAN LUNDGREN: But as to your general
15 knowledge, even after the time you returned, you have
16 no knowledge of any building permits or conditional
17 use permits?
18 THE WITNESS: Yeah. Why would I? Why
19 would I want to?
20 CHAIRMAN LUNDGREN: Well, I'm just asking
21 what you know, sir, that's all.
22 THE WITNESS: Yeah. No, I don't know.
23 CHAIRMAN LUNDGREN: Prior to 1971, when
24 your dad was conducting the business, and prior to
25 you going to Minnesota, did we understand you

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1 THE WITNESS: No.
2 CHAIRMAN LUNDGREN: Up until the date you
3 purchased it, when you walked in there, and if we
4 walked in with you, what would you see?
5 THE WITNESS: You would see a fuselage of
6 an airplane hanging on the east wall, uncovered. You
7 would see a mess. I wish Max was here. He could
8 testify to that. And you would see -- in that shop,
9 you would see where his son, Dane, had built boxes
10 for the dairy, you know, as far as the milk boxes
11 there. You would see some of those in there. You
12 would see a semblance of a -- well, I won't even call
13 it a bathroom, but they did have the plumbing. And I
14 don't know how they used it, but it was plumbed for a
15 bathroom. And on the other side, you had a welding
16 facility there, which had, at one time, it looked
17 like it had caught fire, and you could see where it
18 charred the rafters up on top. And a big lift, a big
19 motor lift in there. And multiple parts and bins and
20 stuff like that.
21 CHAIRMAN LUNDGREN: At the time you
22 purchased it, was there an office located in that
23 building?
24 THE WITNESS: No, there was not.
25 CHAIRMAN LUNDGREN: And was there running

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1 hot and cold water?
2 THE WITNESS: There was cold.
3 CHAIRMAN LUNDGREN: Cold water?
4 THE WITNESS: Yes.
5 CHAIRMAN LUNDGREN: And it had power.
6 THE WITNESS: It had power.
7 CHAIRMAN LUNDGREN: And a semblance of a
8 bathroom, which we don't know how anybody used.
9 THE WITNESS: I don't think he ever used
0 it. If it was, it wasn't very private, let's put it
1 that way.
2 CHAIRMAN LUNDGREN: And what changes have
3 you made in that office since you've purchased it?
4 THE WITNESS: We have a lunchroom in there
5 and a place where we can do our coveralls, a laundry
6 room, a bathroom, and two offices. Which I
7 designated in when we did the -- I haven't been
8 trying to hide anything. We got a building permit.
9 I mentioned that early on, that that's what we
0 intended on doing in that.
1 CHAIRMAN LUNDGREN: Okay. Now, in the
2 remodeling work which you have done, have you
3 expanded the footprint of the shop in any way?
4 THE WITNESS: I haven't.
5 CHAIRMAN LUNDGREN: And you moved in when
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1 water company conduct in what we know as the shop?
2 THE WITNESS: Well, repairing backhoes and
3 stuff like that. But for -- I did, at one time,
4 built some forms for him there for one of his pump
5 houses. I testified to that. It -- like I say, the
6 use of my father in that shop was limited because of
7 the fact that he didn't want to move all of the junky
8 equipment in there.
9 CHAIRMAN LUNDGREN: Any other questions
10 from the Board? Mr. Hathaway, do you have any
11 follow-up?
12 MR. HATHAWAY: Just one, if I could.
13 CHAIRMAN LUNDGREN: You may.
14
15 CROSS EXAMINATION
16 BY MR. HATHAWAY:
17 Q. Mr. Wilkinson, what type of construction
18 are you in?
19 A. Pardon?
20 Q. Are you in the water and sewer
21 construction?
22 A. We're in the steel erection, steel roofs,
23 residential, commercial. We've done the pump houses
24 for it. I mean, we're in the construction business.
25 Q. So all manner of construction?
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you purchased that shop to conduct what kind of
business?
THE WITNESS: Construction business.
CHAIRMAN LUNDGREN: And where did you
perform your construction duties prior to purchase of
the shop?
THE WITNESS: At my home under a
conditional use permit.
CHAIRMAN LUNDGREN: When did Harry quit
the construction business?
THE WITNESS: Well, it would have to be --
he was 84 when he climbed off the backhoe at the same
time. But as far as the water company was concerned,
it continued. Wayne managed the water company and
it's been continuous since, you know, since I bought
the place. That water company has been there all of
the time.
CHAIRMAN LUNDGREN: Now, did the water
company have an office in the shop?
THE WITNESS: It was in the house.
CHAIRMAN LUNDGREN: It was in Wayne's
house?
THE WITNESS: No. It was both in Wayne's
and Dad's house.
CHAIRMAN LUNDGREN: What business did the
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1 A. Yeah.
2 Q. Residential and small commercial?
3 A. Yeah.
4 MR. HATHAWAY: Okay. That's all I have.
5 Thank you.
6 CHAIRMAN LUNDGREN: Mr. Hammond?
7 MR. HAMMOND: No, thank you.
8 CHAIRMAN LUNDGREN: Mr. Wright, and
9 follow-up?
10
11 RE-DIRECT EXAMINATION
12 BY MR. WRIGHT:
13 Q. And if you were denied the opportunity to
14 use this property for the business, it will have a
15 direct impact on your financial circumstances.
16 A. Very definitely.
17 MR. WRIGHT: Thank you. I don't think I
18 have any more questions.
19 CHAIRMAN LUNDGREN: Thank you, sir. Thank
20 you very much.
21 MR. WRIGHT: That's all the witnesses that
22 I have, but I do have -- I will be very, very brief
23 with my arguments, in trying to be succinct.
24 There are four areas that I would like
25 this Board to consider. Number one, it is a
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<p>SHEET 17</p> <p>1 jurisdictional matter. It's a subject matter 2 jurisdiction. And I submit that the time to file an 3 appeal in this matter, at the time the appeal was 4 filed, was ten days. I have provided the Board 5 members with a copy of a Motion to Dismiss. Within 6 that Motion to Dismiss, I have a memorandum. And 7 that memorandum lays out the legal basis for doing 8 so, and it is simply that the legislature enacted 9 Senate Bill 60 that took effect on the 2nd of May. 10 And in that, it provides that if the County does not 11 have an ordinance that sets forth a time frame to 12 file an appeal, then you have ten days. Otherwise, 13 the community -- or excuse me, the governing body can 14 go ahead and put that into place. The ordinance that 15 was put into place that grants 30 days, was not until 16 August.</p> <p>17 So if we take a look at the law as it 18 existed at the time this was filed, there being no, 19 as far as I know, there was no time frame within 20 which to file an appeal to the Board of Adjustments, 21 therefore, the state law would apply. The ten days 22 applies. This Board does not have jurisdiction. 23 There are some exceptions to that rule, 24 and one of them is whether there's a retroactive 25 application. I would submit that there is no</p> <p>129</p>	<p>1 of a land use authority to an appeal authority." 2 Now, that would be to this body; is that 3 correct?</p> <p>4 MR. WRIGHT: It would be to -- at the time 5 it would have been to the Board of Adjustments, which 6 held that position, yes.</p> <p>7 CHAIRMAN LUNDGREN: Okay. Sub-paragraph 8 Number 2, it says, "In the absence of such an 9 ordinance, and at a minimum, an adversely affected 10 party shall have ten calendar days to appeal." Does 11 that establish a maximum time?</p> <p>12 MR. WRIGHT: Does it establish -- no, it 13 doesn't. It says you have ten days to appeal. I 14 will represent, as I talked to some of the drafters 15 of this legislation, two or three from a legislative 16 history standpoint, that they informed me that 17 they --</p> <p>18 MR. HATHAWAY: I object. It's hearsay. I 19 mean, this is really rank hearsay. And it really 20 goes to the truthfulness of what was said as it 21 relates to this particular statute.</p> <p>22 CHAIRMAN LUNDGREN: And I'm going to 23 sustain Mr. Hathaway because I think our burden is 24 not to look into legislative history, but first read 25 the plain language of the ordinance.</p> <p>131</p>
<p>1 retroactive application in this instance. Because on 2 the plain language of the ordinance that was put into 3 place, it did not say that it would go back.</p> <p>4 Moreover, I believe that that's an issue that's a 5 substantive issue; it's not a procedural issue that 6 would relate back.</p> <p>7 CHAIRMAN LUNDGREN: You're speaking of the 8 County ordinance relating back?</p> <p>9 MR. WRIGHT: Correct.</p> <p>10 CHAIRMAN LUNDGREN: Okay.</p> <p>11 MR. WRIGHT: That was done, again, in 12 August. So based on that, that's my motion to 13 dismiss this whole matter.</p> <p>14 CHAIRMAN LUNDGREN: Before you go on, can 15 we discuss this matter with you?</p> <p>16 MR. WRIGHT: Sure.</p> <p>17 CHAIRMAN LUNDGREN: I'm looking at your 18 brief, and I want to make sure that what information 19 we have is correct. On your Motion to Dismiss, at 20 the bottom of the first page, you quote Senate Bill 21 60, or Section 17-27-8A-704.</p> <p>22 MR. WRIGHT: Yes.</p> <p>23 CHAIRMAN LUNDGREN: And it says in 24 Paragraph 1, "The County shall enact an ordinance 25 establishing a reasonable time to appeal a decision</p> <p>130</p>	<p>1 MR. WRIGHT: I don't disagree with that. 2 CHAIRMAN LUNDGREN: And I guess I'm hung 3 up with the language. And it says, "At a minimum, an 4 adversely affected party shall have ten days to 5 appeal."</p> <p>6 MR. WRIGHT: The way you would want to 7 read it is nonsensical because then there is no 8 maximum.</p> <p>9 CHAIRMAN LUNDGREN: And -- okay. Would 10 you explain to me how the maximum fits in this so we 11 understand?</p> <p>12 MR. WRIGHT: I don't believe it does. 13 Because my understanding is that a county cannot pass 14 an ordinance for less than ten days. That's the 15 purpose of that language. "At a minimum." You could 16 not have -- that we could not adopt one that says you 17 have five days to appeal. Because that language 18 says, "At a minimum, ten days."</p> <p>19 It is my argument and belief to the extent 20 that it's ambiguous that you would look to the 21 legislative history. The legislative history would 22 support the fact that that "at a minimum" was to tell 23 governing bodies you can't say you have two days to 24 appeal, you don't have seven days to appeal, you have 25 a minimum of ten days to appeal. But it does</p> <p>132</p>

1 establish that in the absence of an ordinance, you
2 have ten days.

3 CHAIRMAN LUNDGREN: Okay.

4 MR. WRIGHT: And to read it otherwise does
5 not give sense to the whole statute and to the
6 meaning of it.

7 CHAIRMAN LUNDGREN: Mr. Brown?

8 MR. BROWN: It seems a little unreasonable
9 to me, just as a person that feels he was damaged by
0 a decision by the county to go to an attorney, try to
1 get an appointment, get it organized enough so that
2 you could file an appeal.

3 We have before us a survey of
4 jurisdictions, and of 24 of the surveyed, only five
5 had ten days, and 19 of them had more than ten days.
6 So is it unrealistic to file an appeal? Apparently
7 not. It's in there. But the minimum thing, to me,
8 if I felt I was damaged from a county by their
9 decision, then I would feel like I would need more
0 than ten days to be organized enough to present a
1 legal appeal.

MR. WRIGHT: Can I respond to that?

MR. CHAIRMAN: Sure.

MR. WRIGHT: That's a policy issue and the
legislature, in their infinite wisdom, said, "If you

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don't have an ordinance, it's ten days." And there
are instances where there are very short time frames.
And you can probably understand a policy reason for
that, is that we have people who conduct their
affairs, who spend a lot of money on these issues.
That's not to say that the County could not extend
it, because they could. And, in fact, the ordinance
was put into place later in August, this 30 days.
Thirty days is fairly typical, it's fairly standard,
but there's nothing, in terms of a policy, that says
you cannot do the ten days. The Right to Appeal is
not constitutional. It's statutory. It's what they
allow us to do. And if they say, "You don't have a
right to an appeal," then perhaps that's an issue
that you could deal with. But the Right to Appeal is
jurisdictional, if you do it timely. If you don't do
it timely, there are multiple cases, and I've cited
those in the memorandum, that if it's not timely
filed, the Board doesn't have such jurisdiction, and
this issue can be raised at any time, all the way to
the Supreme Court; whether it's raised below or not.

It's my belief and argument that just the
plain language in the way it's set up, we have this
window of time and we have a new state law that went
into effect, we have had no appeals, other than this

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1 one, from the time that our -- well, I take that
2 back. We did have one additional appeal, but it was
3 even beyond I think the 30 days. Outside of that,
4 this issue doesn't affect any other proceeding that
5 I'm aware of. But I think simply, in the plain
6 reading of the statute, I think it's jurisdiction.

7 CHAIRMAN LUNDGREN: Mr. Vancampen and then
8 Mr. Mullen.

9 MR. VANCAMPEN: Mr. Wright, between May
10 17th and August whatever it was when the new thing
11 was enacted, what recourse would Mr. McMillan have
12 had?

13 MR. WRIGHT: He could have filed an appeal
14 on or before the 27th of May.

15 MR. VANCAMPEN: To whom?

16 MR. WRIGHT: To the Board of Adjustments.

17 MR. VANCAMPEN: Was there a city Board of
18 Adjustments?

19 MR. WRIGHT: There was a -- there was a
20 Board of Adjustments, yes. Were the offices -- now
21 just to be clear, it had not functioned for a number
22 of years, but we had the ordinance, the structure,
23 and everything in place. In fact, it immediately
24 went forward to do that, and it was during that time
25 -- I mean, to fill the seats. Based upon that

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1 ordinance, that it was determined to go ahead, the
2 County decided to go ahead and redo and create this
3 Board of Appeals in August.

4 But, to answer the question, did Mr.
5 McMillan have a right? Absolutely. Absolutely. And
6 in fact, if it had been timely filed, this would not
7 have been an issue.

8 MR. VANCAMPEN: So what you're saying is
9 if on August 30th, the County Planning Commission had
10 approved this, then Mr. McMillan would have had 30
11 days to appeal?

12 THE WITNESS: Correct.

13 MR. VANCAMPEN: And anyone today would
14 have 30 days to appeal?

15 MR. WRIGHT: Correct. Absolutely. That's
16 my position.

17 MR. VANCAMPEN: Okay.

18 MR. MULLEN: I have a couple of questions.
19 As I read this Paragraph 2 that we read, "In the
20 absence of such an ordinance, and at a minimum," and
21 I read that as at least, "the adversely affected
22 parties shall have ten calendar days to appeal." I
23 think anyone in a jurisdictional capacity or in a
24 court of law would accept the fact that a maximum
25 would be whatever would be determined reasonable by

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1 whoever was sitting on a Board to try to determine
2 something, if there was a maximum. Reasonable as to
3 something that works with most people in most
4 jurisdictions in some capacity.

5 The question I have is, before this new
6 state law was enacted, what did the County have in
7 effect for a time frame? What was used by the
8 County? What was the precedence that the County used
9 for a time frame for the appeals to be made? That's
10 the first question I have.

11 MR. WRIGHT: Okay. And I'm trying to go
12 back and remember what cases I would have had. I had
13 one -- to answer the question, there was not a
14 specified time. So I --

15 MR. MULLEN: That's correct. But there
16 was a time frame that was given by the County
17 Planning Office that was referred to in several
18 issues that we have here. And that period of time --
19 I'm going to ask Sherrie what that period of time was
20 based on what Mr. Wilkinson gave on one of these
21 issues that we have here, when he told somebody -- I
22 think it was Ron Barrett. What was the time frame
23 that he refers to?

24 MS. CHRISTENSEN: His note on the top of
25 the application says "Original ap within 30 days,

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1 that the County had set. And not only had the County
2 set that precedence over those many years that we had
3 operated, but the County has now adopted 30 days as
4 that particular time frame in their new ordinance.
5 And so it carries through. In my mind, that carries
6 through in the ordinance from the State saying that
7 "at a minimum of ten days," says just exactly that.
8 It's a minimum of ten days. And if we decide we have
9 some prejudice to show in the County, especially
10 during this time period, which is a minimal time
11 period that we're dealing with in not only this
12 particular appeal, but it appears to me that a 30-day
13 period was certainly applied as far as the County as
14 far as reasonableness is concerned.

15 MR. WRIGHT: May I respond to that?

16 MR. MULLEN: Please.

17 MR. WRIGHT: With all due respect, you've
18 raised one issue, and I'm not even sure that one
19 example is sufficient, nor is it appropriate to say
20 that Kent Wilkinson had the authority, legislative
21 authority, to say it's now 30 days. And I don't
22 believe that this is a precedent issue. I don't
23 think the analysis fits into it. I think it's a
24 strict statutory, legislative issue, and that the
25 subject matter jurisdiction is what it is. If there

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1 okay, K.W."

2 MR. MULLEN: And so at that point in
3 time -- and this was for what time frame? This was
4 in what year?

5 CHAIRMAN LUNDGREN: The Barrett appeal
6 would have been probably four years ago.

7 MS. CHRISTENSEN: December of '01 is the
8 date on the faxed copy. There is a --

9 MR. MULLEN: Okay. So November 1, 2005.

10 And let me ask Mr. McMillan a question.
11 Mr. McMillan was a member of the Planning Commission
12 for a number of years and also on the County Council.
13 To your memory, sir, can you think of time frames
14 that were involved in appeals to the Board of
15 Adjustment during your tenure in these organizations?

16 THE WITNESS: I'm embarrassed when I went
17 back there and read that there is no 30 days showing.
18 We used 30 days. And I think that because it calls
19 for 30 days on the district court, we must have
20 believed that. But during all of those years on the
21 Planning Commission or whatever, 30 days was always
22 what we used. I'm embarrassed that it is not in the
23 Code.

24 MR. MULLEN: We're all finding that's the
25 case. And I'm thinking in terms of the precedence

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1 was no time frame before, it didn't matter, and the
2 30 days didn't matter. I don't even believe it
3 mattered if you -- and I haven't seen anything in the
4 record where somebody said it's 30 days, the
5 prejudice. Because it doesn't matter. Back then,
6 there was no time frame. It just doesn't matter.

7 But I don't believe the analysis is
8 appropriate for this issue of subject matter
9 jurisdiction. And that's all I'll say.

10 CHAIRMAN LUNDGREN: Follow-up question?
11 Is it your opinion that the state legislature was
12 stating that a county could pass an ordinance with
13 less than ten days? Or was the state legislature
14 assuring that every citizen had at least ten days to
15 apply?

16 MR. WRIGHT: It is my opinion that the
17 legislature wanted to make sure that there was not
18 less than ten days to file an appeal.

19 CHAIRMAN LUNDGREN: Thank you.

20 MR. WRIGHT: Ten days or more.

21 CHAIRMAN LUNDGREN: Thank you.

22 MR. HATHAWAY: Mr. Chair, since we are
23 addressing this issue, might I be heard on it? Would
24 that be helpful? Or would you prefer that I wait
25 until I make my final remarks?

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1 CHAIRMAN LUNDGREN: Actually, let's do
2 this: Let's take a short recess. We've been going
3 at this for a while. And I believe we'll allow you
4 to respond, and Mr. Hammond to respond because these
5 are fairly technical issues. And I think in terms of
6 context, it will be good to evaluate all of the
7 arguments. So I'll allow Mr. Wright an opportunity
8 to finish his arguments on this jurisdictional issue,
9 we'll debate it back and forth a little bit, and then
10 you may move to your next issue. Is that okay with
11 you?

MR. HATHAWAY: That's fine.

CHAIRMAN LUNDGREN: Thank you. We're
adjourned for five minutes.

(A break was taken.)

CHAIRMAN LUNDGREN: Ladies and gentlemen,
we'll go back on the record. Mr. Wright, I believe
you had the podium.

MR. WRIGHT: I thought it was Mr.
Hathaway.

CHAIRMAN LUNDGREN: I stand corrected.
Thank you. Well, first, were you finished with the
points that you wanted to make on this sole issue?

MR. WRIGHT: Yes.

CHAIRMAN LUNDGREN: Very good.

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1 respectfully, is not a jurisdictional statute of
2 limitations. If anything, it's a charge to the
3 County to act.

4 Now, I would like to review what the
5 County has done in this case because I think it bears
6 on what de facto the time limitation in Morgan County
7 is to file an appeal.

8 The decision was rendered on May 17, 2005.
9 The Notice of Appeal was on June 16, 2005. In
10 between those two days, within about ten, was the
11 County's response to a GRAMA request that was served
12 on May 15, 2005. Notably, that was received after
13 the ten calendar days set forth in the statute.
14 Notably, Coventry Cove themselves argue that it
15 shouldn't even be ten calendar days. In their brief,
16 they calculate the deadline being March 31, 2005;
17 which doesn't include weekends.

18 MR. WRIGHT: May 30th.

19 MR. HATHAWAY: So even the argument that
20 the Coventry Cove subdivision is making is
21 inconsistent with now what they're arguing the
22 statute of limitations, as according to them, says.
23 In any event, the notice was filed on June 16, 2005.

24 On July 11th, and if I could approach, I
25 have a copy of the letter from Mr. Wright to me where

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Mr. Hammond?

MR. HATHAWAY: Hathaway.

CHAIRMAN LUNDGREN: Hathaway. You know,
you guys ought to change your names because I'm
dyslexic with those "H's."

MR. HATHAWAY: The "W's" and the "M's"
are fouling me up. Let me focus on the time of this
question, and really I would like to make two points.
One, the Board -- the questions are right on the
mark. And really all one needs to do is read and
apply typical rules of construction to the statutes.
17-27-A-204-2 says, Section 1, "The County shall
enact an ordinance establishing a reasonable time to
appeal a decision of a land use authority to an
appeal authority." Period. Sub-section 2, separate
and distinct from the mandate of what the County
should do, "In the absence of such an ordinance, and
at a minimum, an adversely affected party shall have
ten calendar days to appeal."

A clear reading. And I guess I practice
law, I don't pretend to be an expert in it. But I
know what a statute of limitations looks like. I
know what a jurisdictional limit looks like. It has
language such as "shall." It states specific maximum
time in which a person has to act. And this,

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1 he informs me that in addition to filing the notice,
2 you need to file a \$250 filing fee. Notably absent
3 from the letter is anything having to do with a
4 ten-day limitation period. Also of note,
5 particularly in light of Counsel's argument, second
6 paragraph, and in response to the questions of the
7 panel, "I have been informed there are vacancies with
8 the Board that must be filled before they convene to
9 consider Mr. McMillan's petition for review."

10 Then in August, sometime in August, the
11 County enacts the statute that, in fact, provides an
12 ordinance, rather, 30 days Right of Repeal. Now,
13 they were charged to do that on May 2nd. They didn't
14 do it until sometime in August. If somebody is going
15 to raise an argument of laches or estoppel, perhaps
16 Mr. McMillan has it, as regards to the County's now
17 eleventh hour attempt to invoke this so-called
18 ten-day limit.

19 But it goes beyond that, respectfully.
20 September 16, 2005, this notice is sent out, the
21 notice of this hearing, signed by this panel, after
22 this panel has been convened pursuant to this notice
23 of appeal. Surely if the County believed at any
24 point that it had a ten-day statute of limitations to
25 deprive this Board of jurisdiction, it would have

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1 impaneled a board, where there had been vacancies for
2 many years and no appeals filed, pursuant to an
3 untimely notice. The County itself didn't believe
4 that it was an untimely notice.

5 The notice of the hearing is sent out
6 dated September 16th. It therein states, "We're
7 having a meeting. Here's the briefing schedule.
8 This is the date of the hearing, 30 minutes to
9 decide," and all of the other provisions. The County
10 didn't unilaterally say, "Oh, too late." That never
11 came up.

12 That date, notably, was continued. The
13 original hearing date was to be in September. First
14 at the instance of Coventry Cove, and later at my
15 instance, which we appreciate, the hearing was
16 postponed to tonight. The briefing schedule was also
17 postponed until briefs were due on October 28th.

18 Then finally, on October 28th, for the
19 first time, the County raised this issue of ten days.
20 The de facto limitation period in Morgan County, as
21 was ultimately adopted by the ordinance sometime in
22 August, is 30 days. It's always been 30 days. The
23 County knew it was 30 days. The County acted as
24 though it was 30 days. And when they finally
25 codified it, it is 30 days. And, again, the facts

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1 show that that's what the County believed, and that's
2 what the County knew, and that's how the County
3 acted. And reading the language itself is clear, as
4 I think the panel is clear, it's not a bar. It says
5 they'll be given reasonable time, in no event less
6 than ten days to file an appeal. And that's what's
7 happened in this case.

8 And so for those reasons, I would suggest
9 that this panel has jurisdiction to get the
10 substantive issue because there's not a jurisdiction
11 bar. And secondly, that the County itself has
12 conceded, through its own conduct, that its time
13 frame for an appeal is 30 days. On that issue, thank
14 you, unless you have questions.

15 CHAIRMAN LUNDGREN: Question, Mr.
16 Hathaway. Did you or Mr. McMillan contact anybody in
17 the planning office or anywhere else and ask what the
18 time to appeal was?

19 MR. HATHAWAY: No.

20 MR. McMILLAN: No.

21 MR. HATHAWAY: As Mr. McMillan stated, we
22 reviewed the record, we saw the 30 days for the
23 court. We noticed the void. That's the first time
24 either one of us noticed the void. And we noted the
25 30 days for the appeal of what was then the Board of

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1 Adjustment to the Third District. And we said,
2 "Let's do it in 30 days."

3 CHAIRMAN LUNDGREN: Mr. Hammond?

4 MR. HAMMOND: Members of the Board of
5 Appeal, this is a very important issue, and I think
6 that Counsel, with all due respect, has misconstrued
7 what this body is authorized to do under Utah law.
8 This body is impanelled based upon County ordinance.
9 This County receives all of its authority to act as a
10 County, to do whatever it does as a County under Utah
11 law. This County cannot do anything that the
12 statutes do not allow it to do. This County had the
13 obligation to come up with a period of time in which
14 to appeal. As of May 2, 2005, the Utah legislature
15 said in the absence of that time period being
16 established, it's ten days.

17 Well, that describes Morgan County to a
18 "T." As of May 2, 2005, Morgan County did not have a
19 period of time established by its ordinances.
20 Therefore, there were only ten days allowed under the
21 law existing at that time. It doesn't matter how the
22 County may have acted since that time, it doesn't
23 matter what GRAMA requests were submitted, it doesn't
24 matter any of the other issues which Counsel has
25 raised. This body does not have the ability to hear

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1 this appeal under Utah statutes.

2 CHAIRMAN LUNDGREN: Just a moment, sir.
3 Board members, comments? Questions?

4 At the risk of beating a dead horse, what
5 is your interpretation in sub-paragraph 2, of the
6 phrase "and at a minimum"?

7 MR. HAMMOND: What "and at a minimum"
8 means is that it's referring back to Section 1, which
9 is telling a county that it shall enact an ordinance,
10 and when it enacts that ordinance, it has to "at a
11 minimum," give ten days.

12 CHAIRMAN LUNDGREN: Okay. Thank you.

13 Mr. Wright?

14 MR. WRIGHT: I would just like to respond
15 to Mr. Hathaway. As much as he would like to elevate
16 me to a decision-making entity for the Board of
17 Adjustments, I respectfully decline. My role is
18 counsel in a lawsuit representing one of the
19 entities. Do I have the right to say, "Sorry. Your
20 appeal is done and over with"? Absolutely not.
21 That's absurd.

22 My letter to him was based upon the staff
23 for the Board of Adjustments who said, "You know
24 what? He didn't --" I mean, he sent it to me. He
25 sent the petition to me, and I forwarded it to the

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1 office where it was supposed to go and they're the
2 ones that said, "You know, when you do this, you have
3 to pay a fee." And I think you're going to hear that
4 that's an issue and that's a problem. I chose not to
5 bring it up, but candidly I think it is a problem as
6 to whether you can perfect it by not paying the fee.
7 I know in other courts you don't pay the fee, and you
8 don't do a timely --

9 CHAIRMAN LUNDGREN: Hold on. I'm going to
10 cut you off here. That's another issue.

MR. WRIGHT: It is.

CHAIRMAN LUNDGREN: So let's finish up
with the ten-day period.

MR. WRIGHT: Okay. So my letter also
says -- and by the way, before the Board, who has to
make the decision as to whether or not it's been
timely filed, has to be put together because the time
for their offer has expired. Far be it for me to
make that determination.

The first opportunity I had to do it was
when I did it, and no one could have decided it until
this Board got together to do it. You're the Board
that has to make that determination. I'm raising the
argument and it's like filing a lawsuit, and a claim,
an answer to that lawsuit, you list a number of

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defenses, one of which could very well be, "You
failed to do this timely."

Now, the fact that that's the case, has to
be determined by the judge, not by the parties that
are challenging it. And it may be done months down
the road in a summary judgment, it doesn't matter.
So to even suggest laches or anything in that nature
is, in my opinion, absurd.

The 30 days to argue that the County has
always treated it that way is without faith, it's
without evidence, it's without foundation, it's
without basis. The only comment I've even heard, and
it's not even in the record, was from Member Mullen.
And that hasn't even been explored. We don't have
Mr. Wilkinson here. There's no evidence to suggest
on this record that there was any pattern, that there
had been any representations. And even if there
were, it doesn't matter because it's jurisdictional.

The statute, Mr. Hammond is absolutely
correct, is jurisdictional. It's what the ordinance
says you can do. It's not one of those, "We do it by
precedent, and therefore, it becomes law." That's
not how it works in this matter. And that's all I'll
say on that.

CHAIRMAN LUNDGREN: Question, Mr. Wright.

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1 On the 11th of July, 2005, were you aware of the
2 language of Senate Bill 50?

MR. WRIGHT: On when?

CHAIRMAN LUNDGREN: July 11, 2005, were
you aware of the language of Senate Bill 50?

MR. WRIGHT: You know, I don't know.

CHAIRMAN LUNDGREN: Thank you. Okay. Any
other questions?

Okay. You may proceed to the next issue.
And let me just interject something. Gentlemen, it
would be most helpful for us, we're going to need
close to an hour to go through the list of facts that
we need to find to wind this up. We have to adjourn
by midnight, so giddyap.

MR. WRIGHT: Giddyap. I will do that. I
do have to say, did I have constructed notice of
that? And the answer would have been yes, because we
are presumed to know when the legislature --

CHAIRMAN LUNDGREN: Well, I'm looking
around, and you had objective notice. When you
actually knew on that date, you were aware of that
language.

MR. WRIGHT: I understand. And I may have
been, I may have not. I just don't know.

All right. The next issue that I raise

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1 has to do with to the extent that this Board is
2 acting in looking at a legislative matter. The PUD
3 overlay zone is a zone. That's exactly what it is.
4 And I don't necessarily disagree with the
5 applications at issue. I'm concerned that some of
6 the decision gathered to the merits will actually go
7 to get the issue of the grandfathering zone; which is
8 the PUD overlay zone. I think you have a copy of it,
9 or you're aware of it as to what it is. I'm going to
10 submit that. I'm not going to go further than that
11 because I do believe that's an issue and I wanted to
12 raise that.

The other jurisdictional issue goes to the
question of adversely affected. I do not believe on
the record as it sits right now, that there are
sufficient facts to show that the McMillans are
adversely affected by this development. In fact, I
believe there are facts to show that this is a
positive thing for their benefit.

They have raised the issue of proximity.
I would submit that proximity in and of itself -- and
let me make sure I am clear on this. It doesn't say
a person that's affected by this development. It
says a person that is adversely affected by it. I
believe that defining what is adverse and how that

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1 would affect the property owner, I do not believe
2 that has been established.
3 I don't believe the flooding is an issue.
4 The flooding is an issue regardless of whether this
5 development had gone in. And the testimony that I
6 heard from the engineer is that the way they've done
7 it, they actually have a storm drain system now on
8 this property, where they didn't have before.
9 They're actually going to have a building that
10 perhaps may slow any type of flooding that takes
11 place. I mean, they've got arguments to say that
12 they're positively benefited by it. To suggest,
13 which is so far speculative, that a building is going
14 to somehow wash away and plug up three holes, is
15 absurd. And in terms of trying to establish damage,
16 what is the damage here? We have proximity. We've
17 had the flooding. And I'm going to get the fiscal
18 impact in just a minute. Even that, I believe, is de
19 minimus, or nothing, and you've got to be real
20 careful, if I can suggest, as to how broadly you're
21 going to define "adversely affected." Because if you
22 say that this development may or may not affect his
23 tax rate --
24 CHAIRMAN LUNDGREN: What standard do you
25 use, Mr. Wright?

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1 MR. WRIGHT: A substantial evidence
2 standard to show a substantive, probable, material
3 negative impact, if you will, to the property. I
4 just haven't seen it. And the petition when it was
5 filed just said, "We're next door. We're downgrade."
6 What's the damage? What's the problem here? Because
7 I suggest this very well may increase this property
8 value. That's a positive benefit. We have seen
9 nothing, no evidence, to suggest it's not going to.
10 We've seen that the development is going to
11 include -- well, you've got the Development
12 Agreement, and they went through, they looked at
13 landscaping, they've looked at a lot of these things.
14 And you compare it to what it was before; was that
15 adversely affected? If you want to suggest that
16 affordable housing, we have houses - and I want to
17 address that when I get to the merits of it - but how
18 does that adversely affect? In what way?
19 I hope we're not suggesting the
20 individuals who will come -- we love people to move
21 into our community. In fact, I believe that's an
22 asset. And so I believe that they are going to be
23 benefited by this impact. I have not seen anything
24 on the record to show they're adversely affected.
25 And unless they establish that, they haven't got

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1 standing.
2 Finally, I'll get into the merits, and
3 they have changed on me a little bit from the
4 petition and what I have now. And I'm going to focus
5 on -- you've got my brief. I tried to address a lot
6 of the issues in the original petition. One of the
7 things I want you to focus on is the issue of whether
8 they've stated a claim upon which relief can be
9 granted.
10 CHAIRMAN LUNDGREN: Now, I'm going to have
11 to interrupt you because I think you're going into a
12 new defense. Let's limit the comments to standing.
13 MR. WRIGHT: Okay. I'm sorry. I am. In
14 fact, I went through --
15 CHAIRMAN LUNDGREN: That's okay. And let
16 the remaining counsel address it. Do you have
17 anything else regarding standing at this time?
18 MR. WRIGHT: I do not.
19 CHAIRMAN LUNDGREN: Mr. Hathaway, I'll get
20 it right this time.
21 MR. HATHAWAY: May I wait until Mr.
22 Hammond speaks, since we have the burden of going
23 forward?
24 CHAIRMAN LUNDGREN: No problem.
25 MR. HAMMOND: I'll just state that

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1 Coventry Cove and Rex Wilkinson agrees with the
2 County as it relates to standing.
3 CHAIRMAN LUNDGREN: Okay.
4 MR. HATHAWAY: Now, let me just very
5 briefly on standing, first of all, the relative,
6 relevant, rather, section is Morgan County Code,
7 Section 16-06-240, addressing appeals. It says, in
8 Paragraph 4, "The applicant, a board or officer of
9 the county, or any person adversely affected by the
10 land use authority's decision administering or
11 interpreting, may file an appeal." It's broad. And
12 it's for the person who wants to go to the effort and
13 expense of filing the appeal to provide whether or
14 not they're adversely affected.
15 Now, Counsel argues, and I just want to
16 make sure that we're not mislead here, that there is
17 a substantial evidence rule. Well, for the Board's
18 information, the substantial evidence rule, when it
19 comes to Planning and Zoning, means any substantial
20 evidence. Any evidence of substance. That's how the
21 Utah Supreme Court has interpreted it.
22 So to say the substantial evidence rule
23 doesn't mean you have to have the substantial weight
24 of the evidence, it's not really weighed. It's just
25 any evidence upon which you can base a conclusion; if

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1 that's even the standard. I suggest it's not. The
2 language is far more clear. And it just says anybody
3 who feels like they've been adversely affected, can
4 appeal the decision.

5 And I, frankly, think -- and it's a little
6 irritating because to me, this is a very duplicitous
7 argument. This is a family that lives within 300
8 feet. The County, by its own rules, mails notice to
9 anybody within 300 feet of a proposed subdivision.
0 Why? Because they're going to be impacted. They're
1 across the street. They're an adjoining landowner.
2 So to suggest that some subdivision across the street
3 that's going to basically metastasize a high-density,
4 hyper-density subdivision across the street from what
5 has historically been an agricultural area doesn't
6 impact adjoining land, is baloney.

7 Second, they're taxpayers. The tax base
8 is going to be affected. They know it. They lied
9 about it in their Development Agreement, but they
0 know it. You've seen the letter that's been filed.
1 The County is aware of it. They know it. They're
2 taxpayers. They don't have children in the school,
3 they're going to pay for it.

4 Third, you saw the pictures of the flood
5 plain of what happens when the Wilkinson Dam has

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6 problems. We've heard the testimony of Mr. Rowser of
7 what may happen if the Wilkinson Dam has problems.
8 It all winds up down in Mr. McMillan's property. And
9 unfortunately, UDOT won't provide adequate aqueduct
0 to allow it to drain off and so, yeah, he's
1 concerned. Why? Because you've got the Gardner
2 subdivision and now you've got this thing proposed
3 that's going to all empty down onto his property.
4 And nary a thought was given to any of the spillways
5 or secondary spillways for the integrity of the dam
6 or anything else. So "adversely affected"? It is
7 laughable that somebody would suggest that the
8 McMillans are not adversely affected in this case,
9 with all due respect to the arguments that have been
0 made by both counsel.

1 CHAIRMAN LUNDGREN: One second, sir. We
2 may want to ask you some questions.

3 MR. HATHAWAY: I'm sorry.

4 CHAIRMAN LUNDGREN: Board members? Am I
5 the only one that gets off on constitutional issues
6 and civil procedures?

7 MR. VANCAMPEN: Dang lawyers.

8 CHAIRMAN LUNDGREN: Articulate again for
9 me what you believe the standard is to determine
0 whether or not someone is adversely affected.

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1 MR. HATHAWAY: Under the Morgan County
2 Ordinance?

3 CHAIRMAN LUNDGREN: Yes.

4 MR. HATHAWAY: In my view, the standard is
5 if I feel like I have been adversely impacted by a
6 decision made by the governing body, the County
7 Council, then I can come file an appeal. And that's
8 it.

9 CHAIRMAN LUNDGREN: So you don't have to
10 have anything of substance; you can just be offended
11 at the development?

12 MR. HATHAWAY: I think it's subjective,
13 and that's how I read it. It's not an arbitrary and
14 capricious standard. It's not a substantial evidence
15 standard. It says anybody who's adversely affected.

16 Now, I'll even spot counsel that it's a
17 substantial evidence standard. And just, again,
18 substantial evidence means any evidence of substance
19 even if, in the courts, even when they're reviewing
20 the decisions of legislative -- rather of Planning
21 and Zoning bodies, not unlike this. Even if they
22 disagree with the decision under the substantial
23 evidence rule, they will not reverse it. They'll be
24 deferential to the body if there's any fact that
25 supports the conclusion that they have reached. So

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1 even spotting Mr. Wright the substantial evidence
2 rule, you've got three pretty darn good factors upon
3 which you could conclude that the McMillans are
4 adversely impacted.

5 CHAIRMAN LUNDGREN: Now, you say three
6 factors. Are those just concerns about the runoff
7 water?

8 MR. HATHAWAY: Yes.

9 CHAIRMAN LUNDGREN: We've got his concerns
10 about the taxes.

11 MR. HATHAWAY: Yes.

12 CHAIRMAN LUNDGREN: And what's the third
13 one?

14 MR. HATHAWAY: He's within 300 feet of a
15 hyper-density subdivision plopping into an A-1, R-120
16 subdivision or zone area.

17 CHAIRMAN LUNDGREN: Okay.

18 MR. HATHAWAY: Thank you.

19 MR. MULLEN: One more question. When you
20 talk about adversely affected, the issue has been
21 brought up here regarding the specific things that
22 are going to occur on this property. Are there any
23 issues, as a citizen of Morgan County, just as a
24 citizen of Morgan County, that would be an adverse
25 affected decision to have this subdivision put in?

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1 MR. HATHAWAY: Perhaps not just a citizen,
2 but certainly a tax-paying citizen, yes; particularly
3 in light of the evidence of the impact that this will
4 have at a higher density in a less expensive home,
5 higher number of children, yes. But anything that's
6 going to affect the property taxes of a tax-paying
7 individual, yes, that's an adverse effect. Just
8 citizenship alone, I would say perhaps that you could
9 make an argument that it's not. But certainly a
10 taxpayer.

11 MR. MULLEN: The question I'm referring to
12 here, what I'm referring to, does the decision of
13 this particular appeal coming forward, will that
14 affect - as well as Mr. McMillan affected as just a
15 member of the community here in terms of how this is
16 going to affect other decisions made down line
17 somewhere, some other subdivision, some other
18 things - is it an impact of, I'm going to say
19 precedence being set here, but this particular
20 subdivision that would harm your client in some
21 capacity other than just his own particular property?
22 In other words, I could be adversely affected by this
23 particular subdivision or somebody else's
24 subdivision. If somebody puts an oil well in the
25 home behind me or something, I could be adversely

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1 affected. Or if it's down the road in Mountain
2 Green, they put a big cell tower up there that's
3 really obnoxious, I could be affected by that because
4 it could lower my property value and other things
5 like that.

6 So what I'm getting at is are there other
7 things that are specific to here that would be of a
8 nature that needs to be brought forward, or you would
9 like to bring forward regarding that?

10 MR. HATHAWAY: I'm certain that the
11 McMillan concern also has to do with the fact that
12 you've got a hyper-density subdivision being plopped
13 into this agricultural area, and what precedent that
14 may have. Now, you know, it may wind up being merely
15 an aberration, because as I understand, the County
16 Council has recently terminated the PUD overlay zone.
17 But that doesn't mean it may not be re-enacted, and
18 there might not be another precedent. Well, here
19 we've got affordable housing, 3,000 square foot lots,
20 9,000 right here. And quite frankly, looking at this
21 subdivision itself, what's to stop the Wilkinsons
22 from coming back later and plopping more in here
23 where the proposed Bed and Breakfast is? Or here,
24 where the proposed buildings are or somewhere else on
25 the property that could suit them? So, yes, that's a

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1 problem that I'm sure the Wilkinsons -- excuse me,
2 the McMillans are concerned with that also would
3 concern other adjoining land owners or people in the
4 vicinity.

5 CHAIRMAN LUNDGREN: Any other questions?

6 Mr. Hammond, do you have anything to add?

7 MR. HAMMOND: No.

8 CHAIRMAN LUNDGREN: Mr. Wright, you're
9 back on stage.

10 MR. WRIGHT: Thank you very much.

11 MR. VANCAMPEN: Can I ask him a question?

12 CHAIRMAN LUNDGREN: Yes, you may.

13 Mr. Vancampen has a question on the
14 standing issue.

15 MR. WRIGHT: Okay.

16 MR. VANCAMPEN: Mr. Wright, you rely, in
17 your argument, on the County Ordinance regarding
18 standing, which you argue on your jurisdiction that
19 we can't apply because it was not in effect at the
20 time the decision was made. So how do you justify
21 that? Let me restate that.

22 MR. WRIGHT: Please. Thank you.

23 MR. VANCAMPEN: In your jurisdiction
24 argument, you say that the County Ordinance was not
25 in place, therefore, the 30 days does not imply. In

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1 your standing argument, you say in the County
2 Ordinance, you have to be adversely affected in order
3 to receive standing. So you're arguing something in
4 one instance that you are arguing that can't apply in
5 another instance.

6 MR. WRIGHT: No. If you're suggesting
7 that I'm arguing the August ordinance in the language
8 there, and applying it back, I am not. In the
9 ordinance that was existing at the time that this was
10 filed, the language was "adverse --" was an
11 "adversely affected party."

12 MR. VANCAMPEN: Okay. I was confused on
13 that.

14 MR. WRIGHT: Does that answer that?

15 MR. VANCAMPEN: Well, no. You've --

16 MR. WRIGHT: I've tried not to argue that
17 statute because I don't think it applies. And, you
18 know, there's an argument on procedurally --
19 procedural things can relate back, but that's a whole
20 different thing. But if you look at the ordinance as
21 it was at the time when this was filed, it's
22 adversely affected.

23 MR. HATHAWAY: And if I could, in response
24 to Mr. Vancampen's question, the language that I was
25 focusing on was not the 30 days, but it is the

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1 identical adversely affected language in the prior
2 version --
3 MR. VANCAMPEN: So that was my
4 misunderstanding. I'm sorry.
5 MR. WRIGHT: That's okay. I just don't
6 believe that a subjective "I'm offended" standpoint
7 is appropriate. This Board needs to be real careful
8 how you define that. I really liked the statement,
9 "I'm adversely affected because my property values
0 are going to be lower, and here's my evidence to show
1 that." That's good. "I'm adversely affected because
2 the risk of my property being flooded is increased
3 because of this development." That's good. I accept
4 that. I haven't seen that here. I haven't seen that
5 the risk is greater. I've seen that it's actually
6 mitigated and lessened. But, anyway, I'll leave that
7 one alone, unless you have any other questions.
8 CHAIRMAN LUNDGREN: Please proceed.
9 MR. WRIGHT: All right. I want to focus,
0 I think, on four. I'm going now to the substance of
1 the arguments here. And my belief is they have
2 failed to state a claim upon which relief can be
3 granted. And this gets into the issues of remedies.
4 What is the remedy? At what point do you say, "All
5 right. The whole subdivision is illegal. You can't

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1 I'm going to ask that.
2 MR. WRIGHT: We can proceed that way. I
3 might just suggest, because I think they're tied
4 together, that maybe I address my items and then I'm
5 going -- because I'm going to come back and say I
6 don't think he, even if this were correct, which I
7 don't believe --
8 CHAIRMAN LUNDGREN: Watching the clock,
9 I'll encourage you to go quickly.
0 MR. WRIGHT: Okay. All right. I
1 appreciate that.
2 Nonconforming use. My position is we've
3 established the evidence that you folks need on this
4 Board to accept, as valid, substantial evidence with
5 respect to this property. The use, under the
6 affidavit and testimony that has been provided here,
7 the use has been a commercial construction use of
8 this property. And it has been for years and years.
9 I would submit that, under the affidavit, it
0 predates, it predates land use regulation. And so
1 the use is grandfathered in. That use is there.
2 On the issue of the shop being there, it
3 has been there since 1971. And its use has not been
4 challenged by anybody since that time. My argument
5 on the laches and the estoppel is that, you know, as

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do it." At what point do you say that? Is it
substantial? What is it? If we were to concede, and
I won't concede, upon the issue of fiscal impact, for
instance, that yes, "You know what? It says 16
affordable housing homes and there were three." And
I'm going to show you what that does to the fiscal
impact, it's de minimus. It's nothing. Are you
going to say, "Oh, that's enough. This whole thing
is illegal." I don't think so. I don't think that's
what it is. I think they have to state a claim that
is sufficient. And I'm not actually sure what it is
that they want to have done. That's another issue.
But I'm going to -- in addition to my brief, and I
won't get into that, I'll leave that for you, but the
ones that have been focused on tonight, I beg to be
addressed.

The first is the nonconforming use.

CHAIRMAN LUNDGREN: I'm going to cut you
off again. And I apologize for that, Mr. Wright, but
I think you're changing horses slightly here. And I
would like to have some comments purely on whether or
not Mr. McMillan has stated a claim for which relief
can be granted. And you're welcome to follow up with
your substantive issues about that because I think
that's going to entail some significant argument, but

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1 a policy matter, we've got to have a cutoff. You
2 can't bring up an issue that should have been
3 addressed years, decades ago, and claim that now we
4 can go back and say, "Oh, we can't have that use."
5 I will concede it to grandfathered use.
6 Our Development Agreement says it's a grandfathered
7 use, which by definition means that it's
8 nonconforming, but it's legal, because it predated;
9 the use predated, the use continues, the structure,
0 which is part of that use, continued as well. And
1 now to suggest -- and I would submit to the extent
2 that it's our burden to go forward and prove the
3 damages and injury, we believe we've done that. But
4 the potential upshot of this is to take away a
5 livelihood from the property and from the property
6 owner.
7 I would also suggest, and I'll just state
8 it's ironic that the property right across the street
9 has a construction business, as well. I think that
0 goes to the issue of we're saying that this use is
1 not compatible with agricultural. Well, excuse me,
2 that's what we've got right across the street. I
3 don't see the problem here. I don't believe that
4 they've met their burden on that issue.
5 I believe that the evidence is sufficient

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1 that that use can go forward under -- and I won't get
2 into it, but if you take a look at the Development
3 Agreement, this was an issue that was important. We
4 wanted to know the nature of that use. If you look
5 at the affidavit, there's also an attachment that
6 defines the nature from the impacts of that use, and
7 that's all that they're allowed. And that's
8 established. That's my position on a nonconforming
9 use. It's not an issue, failed to state a claim upon
10 which relief can be granted as to that issue.

11 Second, affordable housing. There are a
12 lot of mechanisms I suppose, and I'm learning as we
13 go, as to what those are; which include land trust
14 and a number of different ways that you have
15 affordable housing. We don't have affordable housing
16 in this community. We need affordable housing. We
17 are required by state law to have affordable housing.

18 This, to the extent there are no
19 guarantees or no assurances, I submit is inaccurate
20 and inappropriate; because this, unlike a lot of
21 developments, we have the actual plan of the home
22 that can be built. We have the footprint. The
23 representations that have been made with respect to
24 the homes and with respect to the properties, we have
25 assurance, absolute assurance that nothing larger
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1 argument that's been raised that says we violated the
2 PUD overlay zone, because it doesn't address that
3 issue. In fact, that was a matter of discussion
4 which ultimately led to the repeal. There was
5 concern about that. But from a legal standpoint,
6 there's nothing that prevents that type -- that
7 prevents this lot size. Affordable housing --
8 CHAIRMAN LUNDGREN: You have a question
9 from Member Mullen.

10 MR. MULLEN: I have a question for you.
11 If you look in the General Plan, under --

12 MR. WRIGHT: 1.3-something. Sorry.

13 MR. MULLEN: Under Chapter 4 -- I'm sorry,
14 that's not it. I'm sorry, continue. And let me find
15 it. I'm sorry.

16 MR. WRIGHT: All right. My belief is that
17 the lot size, coupled with the footprint, and the
18 home would have to be part of the guarantees with
19 respect to this property, you will not find any
20 property anywhere that reaches the values of these
21 properties because of those two things. When it was
22 looked at, and we've got language in the Development
23 Agreement that addresses this issue, we had
24 representations made with respect to the value. Let
25 me address that. We put the standard as to what is
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1 than this home is going to be built. And the plans
2 that were submitted, they are actually part of this
3 agreement. And if you will look, you all should have
4 a copy of this, and you may have seen this, but I
5 think it is Exhibit K, where we go through and show
6 the footprints. And we also show the plans and what
7 they are. And they have to be built that way.

8 Now --

9 CHAIRMAN LUNDGREN: That's part of the
10 Development Agreement?

11 MR. WRIGHT: It is. They don't deviate
12 from that.

13 The lot size is also part of the issue.
14 These lots are small. I guess if you go back, and
15 it's my understanding that when -- the affordable
16 housing was always an issue that the developer wanted
17 to do, Mr. Wilkinson wanted to do. It started off
18 with a couple of eight-plexes, and there was concern,
19 as I understand it, that the fiscal impact, was far
20 more negative, and so there was a concern from the
21 fiscal impact which ultimately led to this
22 development.

23 Now, the PUD that allowed this is gone.
24 They raised an issue about the lot size. Other than,
25 "I'm offended," subjectively, there was not one legal
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1 affordable housing. In our financial, in our
2 financing markets, it's very interesting what you can
3 buy with very little money because we have gone to
4 no-interest loans. You could buy a loan, you could
5 -- it's amazing what you could buy with a no-interest
6 loan. Now, is that good practice? Probably not.
7 Maybe. And who knows? But you can buy a fair
8 amount, based upon our financing. We've established
9 the 80 percent median as the \$41,000 as to what it
10 is. We have the representation. We have the lot
11 sizes small. We have the house print that has to be
12 built on it. You're not going to go beyond that. We
13 believe that we have satisfied what this ordinance
14 would require with respect to that.

15 Now, let me go one step further. How much
16 was given to this development for affordable housing?
17 And I will defer to --

18 CHAIRMAN LUNDGREN: May I interrupt you
19 for a second, sir?

20 MR. WRIGHT: Certainly.

21 CHAIRMAN LUNDGREN: How much are the
22 houses going to sell for?

23 MR. WRIGHT: I think the lots are --
24 you're suggesting in your question that they're going
25 to be built by Mr. Wilkinson and then he'll sell
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1 them.
 2 CHAIRMAN LUNDGREN: I'm suggesting that
 3 either Mr. Wilkinson knows or has made a
 4 representation of what the market values of these
 5 houses are going to be when he builds them. And do
 6 we have a number?
 7 MR. WRIGHT: The representation was
 8 \$150,000. And it was also with, because of the time
 9 frames, consideration for inflationary pressures.
 10 And that's in the Development Agreement.
 11 CHAIRMAN LUNDGREN: Is the \$150,000 figure
 12 in the Development Agreement?
 13 MR. WRIGHT: It is. Well, let me read the
 14 language.
 15 CHAIRMAN LUNDGREN: Can you point us to
 16 where it is in the Development Agreement?
 17 MR. WRIGHT: Yes. It is on Page 7 of the
 18 Development Agreement. I will read generally in the
 19 middle part of it. "Affordable housing is an
 20 investment in the community and is defined as
 21 ownership opportunities generally affordable to
 22 buyers with combined household income of 80 percent
 23 or less of the median income for Morgan County."
 24 Based on the most recent available statistical data
 25 from the state -- and it's 2003. We're now two years
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later. The median income -- two years and some
 hurricanes and other disasters later, the median
 income for Morgan County is, \$51,000, 80 percent is
 \$41,000. The developer represented average sales
 price is \$150,000. "The developer agrees to use his
 best efforts to ensure that affordable housing, as
 defined by law, is provided for the 15 lots as he
 represented to the public, taking into consideration
 inflationary pressures."

CHAIRMAN LUNDGREN: Let me ask you a
 question. Hypothetically, should Mr. Wilkinson
 decide to build very luxurious but small homes that
 sell for a quarter of a million dollars, does the
 County have any means to enforce this Development
 Agreement so that the housing does remain affordable?

MR. WRIGHT: The answer to the question --
 I mean, the question presupposes that they could
 build something beyond what they've identified, I
 would submit they cannot.

CHAIRMAN LUNDGREN: Well, indulge me.

MR. WRIGHT: But the latter part of your
 question is, do we have a way to come back and say,
 "Oh, we can't sell it for that"? The answer is no,
 we don't. So the market is going to dictate that.
 But the market is going to be, for these lots, with
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1 this development, based upon the size of the lots, it
 2 will be based upon the homes that are there.

3 MR. MULLEN: Okay. Regarding this
 4 particular issue, and I'll be going back to the other
 5 one in a moment here. On Page 49 of the -- Chapter
 6 9, Housing, General Plan. On Page 48, if you will,
 7 first of all, it's Policy 1.15, it indicates that,
 8 "The investigating methods, such as deed
 9 restrictions, to ensure that affordable housing will
 10 remain affordable to future residents of Morgan
 11 County."

12 Turning to the next page, Objective 1.3,
 13 "Work with property owners and developers to
 14 encourage development in the amount and type of
 15 housing that accomplishes the community's general
 16 planning goals, including negotiating Development
 17 Agreements in which providing deed restricted
 18 affordable housing serve as part of the public
 19 benefit justifying the agreement."

20 And in Policy 1.31, below that, "Create
 21 density bonuses in the form of growing units. When
 22 density bonuses are adopted, they should be allowed
 23 only where they supply housing for clearly expressed
 24 community needs and should be coupled with
 25 limitations on future use of sale of housing units.
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1 There is nothing in this Development Agreement
 2 whatsoever that has any deed restrictions or any
 3 guarantees that these homes will remain affordable
 4 even with inflation, and it goes on by comparing it;
 5 is that correct?

6 MR. WRIGHT: That is correct.

7 MR. MULLEN: Okay. Thank you. The next
 8 question I have deals with what I was fumbling for
 9 earlier, and I apologize for that. You mentioned the
 10 size of the lots. In the Planned Use Code, under
 11 Table 16-22-040, I don't have a page number because
 12 they don't have page numbers on this, but it's under
 13 Section 22.

14 MR. WRIGHT: 16-22 --

15 MR. MULLEN: Yes. 22-16-040, Area
 16 Regulations. On the very bottom of that page, it
 17 lists the minimal lot area in square feet for the
 18 single family dwellings in here and it lists R-120,
 19 R-112, R-18, RM-7, RM-15, and the lower numbers there
 20 are for multiple units that you're aware of, and
 21 those are explained in the earlier part of the
 22 previous page, if you will, as to what those
 23 districts are explained as; median, residential,
 24 density, so forth and so on.

25 And if you'll refer back to Page 26 of the
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1 General Plan on Chapter 4, Policy 2.2.4. Page 26,
2 2.2.4. It indicates here that the General Plan
3 eliminates the R-18, RM-7 and RM-15 from the Land Use
4 Benefit Codes since they are not required to promote
5 the goals of this plan and are inconsistent with the
6 agricultural and natural resources objectives of this
7 plan. What I'm interested in here is if we have lots
8 that are far less, size-wise, than even the ones that
9 are being eliminated on the General Plan, then to me
10 that indicates that this development, the size of
11 these lots in this development are not in conjunction
12 with the General Plan because the Plan has asked to
13 eliminate the lower, even for these homes or whatever
14 indicated here -- it's not consistent and that's the
15 concern that I have. Not a question, it's just a
16 concern that I'm addressing. Okay. And that hasn't
17 been addressed by the County in any capacity.

18 MR. WRIGHT: To the extent that the plan
19 suggests that we do away with them, that has not been
20 implemented. And I understand the direction that
21 you're looking at. I do.

22 MR. MULLEN: The reason I'm looking at it
23 is because the PUD Overlay requires it to be in
24 concert with the General Plan. And in this case,
25 it's not, in terms of the size of those lots, from

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1 what I see here.

2 MR. WRIGHT: I'm looking at the section,
3 again. "Minimum lot area in square feet involving
4 uses for buildings." I don't know if that 2000
5 reflects the R-120. Of course, none of the other
6 ones apply. So that area doesn't apply, and I'm not
7 sure that you apply it, because the PUD ordinance
8 talks about affordable housing and what we need to
9 do; and because there's no provision that restricts
10 that, that you have a direct violation of the General
11 Plan.

12 CHAIRMAN LUNDGREN: Could affordable
13 housing be built on larger lots?

14 MR. WRIGHT: Could it? Yes. On larger
15 homes or --

16 CHAIRMAN LUNDGREN: Larger lots.

17 MR. WRIGHT: Can it be?

18 CHAIRMAN LUNDGREN: Could it be?

19 MR. WRIGHT: I suspect it probably could,
20 depending on what you do. But if you do -- if you
21 don't do it with a land trust or other ways, then you
22 run what we believe is the greater risk. In this
23 instance, the lot size and the house, coupled
24 together, make it affordable. If you go beyond that,
25 create that lot, then you've got to look at other

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1 mechanisms that would make it affordable housing.

2 CHAIRMAN LUNDGREN: Mr. Brown has a
3 question.

4 MR. BROWN: I guess this is the Planning
5 and Zoning coming out in me and John here. You know,
6 I'm really frustrated when I go through these minutes
7 and I see that it was presented and advertised all
8 through the process as 1/8 acre lots. And then right
9 at the end of the process, somebody gets smart and
10 does the calculations. And, you know, shame on the
11 Planning Commission. That's their job. And here we
12 get right at the end and all of the sudden, it's not
13 1/8 acre lots, it's 1/16 acre lots, or 1/14, or 1/13,
14 or however you do the calculations. And that's why,
15 to me, it never fit anything, let alone a PUD. Even
16 if you average in the bonus density that was given
17 for trails and whatever, it didn't even come close to
18 1/16 acre lots. I don't know how they justified
19 that. The Planning Commission was negligent in what
20 they did, in my opinion.

21 MR. WRIGHT: I'm going to respectfully
22 disagree. To the extent that the public was invited,
23 there are 1/8 acre lots and they were open to the
24 public. The public could come in and look at that.
25 And my understanding is the plans were submitted,

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1 they were available for a public inspection, and that
2 anybody had a chance to take a look at them if they
3 had wanted to.

4 I also have to go a step further. I want
5 you to think about this for a minute, because as I
6 spoke with our former planner/engineer, he made this
7 comment, which I found very interesting. You can
8 have affordable housing, right, if you have
9 eight-plexes, you can have them all together. You
10 don't get any closer living habitation than that. If
11 you have condominiums, you have a common area, but
12 you can have affordable housing in that capacity. So
13 what you could have -- two sets of condominiums with
14 nine each, in this property, they are right next to
15 each other. And just maybe a backyard. This is
16 actually a step more favorable. We're going to give
17 these individuals who are going to live here a plot
18 of land to put a garden in, they can do whatever. So
19 at what point, at what point do you say it's
20 inappropriate? You know --

21 MR. BROWN: Because the Planning
22 Commission was mislead, and they didn't do their
23 homework to see that they weren't 1/8 of an acre.
24 They weren't even close.

25 MR. WRIGHT: I'm not sure that they were

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<p>1 mislead, and I don't believe, if you asked them, that 2 that would be the case. I believe if you ask them, 3 they had what they had, they saw it. You could go 4 back and look at the plans, the public could have, it 5 was there. It was there. 6 MR. BROWN: As far as I can see in the 7 minutes, it didn't even come up until the Council 8 meeting. One, Councilmen did their homework; and 9 two, Councilmen were sharp enough to vote against it 0 because of that reason. I don't think it -- I don't 1 even see it in the minutes of the Planning and 2 Zoning. 3 CHAIRMAN LUNDGREN: Let me just interject 4 something, in the interest of time, because we're 5 really pushing the line. Your point is well taken, 6 Mr. Brown, but I suspect that it's probably moot 7 because we have to go not on what the Planning 8 Commission decided, but on what action is taken by 9 the Council. So either the Council had authorization 0 under the Plan to confirm and pass these small lots 1 or they did not; regardless of how it may have been 2 advertised by the Planning Commission. 3 Am I mistaken on that? 4 MR. WRIGHT: No. I agree. 5 CHAIRMAN LUNDGREN: Mr. Hathaway? 181</p>	<p>1 comments on this. Just one last thing that this 2 Court allows on this issue. There is, on Page 6 of 3 the Development Agreement, a summary statement, and I 4 just -- three sentences. "The developer summarizes 5 and states the number one reason for the development 6 is to have affordable housing in Morgan County. 7 Affordable housing will be the prime selling point of 8 this development. The impacts will be offset by 9 having our youth and retired people able to live 10 here. In a society where grandparents are often 11 distanced from their grandchildren, the effect of 12 surrogate grandparents who live close by has been 13 known to bring a greater stability to young families 14 in the community." 15 I would also, on this point, say, even if 16 you took away the bonus density, this gets to the 17 issue of relief for affordable housing which I would 18 argue against, because I believe the evidence is 19 sufficient. What does that do? Does it take it from 20 20 lots to 18? You're going to remove two lots and 21 not make them affordable. That's problematic. 22 The other areas that I think I need to 23 address is the fiscal impact. If you'll just turn 24 with me very briefly - I think I can do this very 25 quickly - to the exhibits of the Development 183</p>
<p>1 MR. HATHAWAY: The appellant has the 2 burden of proving that the land use authority -- and 3 I note that the Code sometimes refers to the Planning 4 Commission and then it will also refer to the 5 governing body of the County distinguishing between 6 the two. This just says -- this is the County Code. 7 "The appellant has the burden of proving that the 8 land use authority erred." And I'm just noting, I'm 9 not necessarily making an argument, but I'm noting 0 that it's saying "land use authority," whereas in 1 other places, it distinguished between planning and 2 zoning as if it means those folks who have made the 3 decision. 4 CHAIRMAN LUNDGREN: Does Mr. McMillan 5 maintain that the listing of the 1/8 acre lots was 6 somehow a factor in the County Council making an 7 incorrect application of allowing the Use Management 8 Code? 9 MR. HATHAWAY: That was something that was 0 discussed in our meeting. That was not included in 1 our notes, and we haven't briefed it and made an 2 issue of it. 3 CHAIRMAN LUNDGREN: Thank you. 4 Mr. Wright? 5 MR. WRIGHT: Thank you. I appreciate your 182</p>	<p>1 Agreement where we have the fiscal impact. It is -- 2 let me get to the exhibit real quick here. I 3 apologize. Here it is. It's, like, D or E. It is 4 Exhibit E. 5 If you'll turn to Exhibit E, the very 6 first page, which in mine is on the left side as 7 you'll open up the book. The reason we make the 8 statement that it is marginally favorable from the 9 County's standpoint and marginally negative for the 10 school district is that page. If you take a look at 11 it, we've got Net Impacts of \$6,076. You have 12 Special Fund Revenues of \$3,797. If you add those 13 two together, it's about \$10,000. Whoops, excuse me. 14 It's about \$9,700 and thereabouts. So that's a 15 positive impact. And then the negative is mitigated 16 as \$6,000. So I guess if you were to combine those 17 two, you have an overall positive impact. And hence, 18 again, I would suggest that we haven't established 19 the adverse effects -- adversely affected by this. 20 But, if you look at the -- and I hope you followed 21 those numbers. If you don't, ask me questions. 22 If you turn from there, one more page 23 over, and look on the right side, it is the Fiscal 24 Impacts, at the top, "RW Design," and it has 25 "Absorption." Do you see that? You have nonview 184</p>

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1 homes of 16, and view homes of 3. Okay. Counsel is
2 right. There's only 18. It should be 15. So what
3 is the impact of that? Well, here's what I would
4 submit to you: It's negligible. And, you know,
5 without going through all of the calculations to
6 decide which way or the other, it could be positive.
7 But here's -- to demonstrate why it's negligible, if
8 you drop down -- let me just take you on this page.
9 CHAIRMAN LUNDGREN: Let me interrupt you
10 for a second, Mr. Wright. And I apologize for doing
11 so. Let me kind of cut to the chase. Does the
12 County have a policy or an ordinance that requires
13 whether or not a new subdivision or new project such
14 as this must make any particular impact on the County
15 to become approved?
16 Let me repeat that so it's clear. So if a
17 project has a substantially negative impact on the
18 County, does that mean that the County Council has an
19 obligation to deny that property?
20 MR. WRIGHT: Under the PUD ordinance,
21 which I think goes directly -- other than this, I am
22 not aware of anything.
23 CHAIRMAN LUNDGREN: Okay.
24 MR. WRIGHT: Other than that. I believe
25 that this was an issue, and if you look at the

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1 ordinance, the PUD Overlay Ordinance, they have this
2 chart that goes through a list of where you get your
3 bonus. And if you look, middle -- partway through
4 that chart, it has, "Positive Fiscal Analysis." And
5 then it says "required to ten percent."
6 CHAIRMAN LUNDGREN: Just give us a second
7 to catch up with you on that.
8 MR. VANCAMPEN: Tell me again where you
9 are.
10 MR. WRIGHT: This is in 16 -- Chapter 35.
11 Go to Chapter 35, and it's the third page. It's
12 actually right at the top of the third page. I hope
13 yours is the same as mine.
14 CHAIRMAN LUNDGREN: Thank you. Okay.
15 We're in Chapter 35 and what section are you working
16 under?
17 MR. WRIGHT: It is section 16-35-040, and
18 it's the chart -- the performance chart.
19 CHAIRMAN LUNDGREN: Okay.
20 MR. WRIGHT: If you go down, mine is on
21 the top of the page, the next page, it says,
22 "Positive Fiscal Analysis."
23 CHAIRMAN LUNDGREN: Right. "Required - 10
24 percent."
25 MR. WRIGHT: It says from "Required to 10

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1 percent," and it's got a little footnote. And if you
2 drop down to the footnote, "A positive fiscal
3 analysis, although required, may earn additional
4 bonus if the project provides a significant ongoing
5 fiscal impact." See, this ordinance was incented; we
6 were trying to incentivize the developer to provide
7 benefit. And while we wanted to have a positive
8 fiscal impact, the more you did, the better. So
9 that's why the analysis is required. That's why, as
10 we take a look at it, the overall, the net, if you
11 will, it's positive; but for the school district and
12 the other it's marginals, as indicated.
13 CHAIRMAN LUNDGREN: Let me point you to
14 Footnote 10.
15 MR. WRIGHT: Okay.
16 CHAIRMAN LUNDGREN: "A positive fiscal
17 analysis, although required," so a positive fiscal
18 analysis is required.
19 MR. WRIGHT: Yes.
20 CHAIRMAN LUNDGREN: But you get additional
21 points if the project provides a significant
22 additional positive ongoing fiscal impact; is that
23 correct?
24 MR. WRIGHT: Correct.
25 CHAIRMAN LUNDGREN: Thank you. That

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1 answers my question.
2 MR. WRIGHT: Let me just submit, if you
3 wanted to look at this page and figure out what they
4 did, you can. But the bottom line is the impact is
5 we take out one home, whether it's \$140,000 or
6 \$150,000, and you take 55 percent of that, because
7 that's what's taxable, the 45 percent is exempt, and
8 then you apply a tax rate to it, and the tax rate is,
9 I think, the page before. Yes, it is. You apply the
10 tax rate, the calculation you will get is roughly
11 \$153,000. And that's value -- or excuse me. I'm
12 sorry, the taxable value would be adjusted by maybe
13 \$153,000, \$160,000. The taxable amount of that is a
14 few dollars. So the impact, ultimately -- and I say
15 "a few dollars" because if you'll drop down and you
16 look at the property tax revenues directly, it's
17 \$4,650. So what they're saying is with all of the
18 homes that we had, we get about \$4,500, \$4,600 in
19 taxes. So if you drop the total value of \$2,328,000
20 by \$150,000 or \$160,000, it has a very small effect
21 on \$4,000. So it's negligible. It doesn't affect
22 it. This is a red herring to argue that this is
23 fundamentally flawed. I submit it is not; that you
24 would find very little difference.
25 CHAIRMAN LUNDGREN: Does the overlay zone

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1 require a positive fiscal analysis for both the
2 school district, as well as for the County?
3 MR. WRIGHT: You've got it as well as I.
4 It just says, "Positive fiscal impact required."
5 CHAIRMAN LUNDGREN: Okay.
6 MR. WRIGHT: The school district is -- I
7 guess the argument would be this is clearly for the
8 County, although we would like to make it for the
9 community. So clearly the County needs to be held
10 harmless on that. I would argue that the net is in
11 favor of this positive, so that we're not in
12 violation of that.

CHAIRMAN LUNDGREN: Do you have anything
else, sir?

MR. WRIGHT: Just the issue of it's out of
place. This is right adjacent to - I think that's
been established - to a development that's going to
go in. It is right immediately adjacent to it. The
fact that it's right in the middle of an agricultural
field is not a valid argument. I am through.

CHAIRMAN LUNDGREN: Any questions for Mr.
Wright before he sits down for a second?

MR. HAMMOND, do you wish to add anything
to what Mr. Wright has said?

MR. HAMMOND: I wish to take a few minutes

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1 felt like that was necessary. I don't believe it is,
2 either, and I don't think it would be inappropriate
3 for the Board to take the matter under advisement if
4 it got too late.

CHAIRMAN LUNDGREN: Mr. Hammond?

MR. HAMMOND: I believe that it's
appropriate for this Board to continue from the time
that it started its meeting, which was the public
notice, until it has determined that it has completed
that. And if that means going past midnight, which I
would rather not do myself, but if that's what it
means, then I don't think that that's inappropriate.

CHAIRMAN LUNDGREN: I would invite
comments from the ladies and gentlemen that are in
the audience, particularly our City Council members,
if you have an opinion?

UNIDENTIFIED SPEAKER: County Council.

CHAIRMAN LUNDGREN: County Council, I'm
sorry.

UNIDENTIFIED SPEAKER: Get it done.

UNIDENTIFIED SPEAKER: I think he deserves
it. Press on.

CHAIRMAN LUNDGREN: Members of the Board?

MR. VANCAMPEN: I think we go until we're
done.

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for our argument, 10 or 15 minutes, if that will be
appropriate at this time.

CHAIRMAN LUNDGREN: Before you start, we
have a point of concern here. And, frankly, I don't
know what the answer is. This meeting was advertised
to occur on this day, not tomorrow. If we dawdle
past midnight, do we have to adjourn at midnight, or
can we continue past midnight?

Mr. Wright?

MR. WRIGHT: I'll restate my position is
that this body, in this capacity, not when you deal
with variances, that's different, but in this
capacity, you are a quasi-judicial body. The Open
Meetings Act doesn't even apply. That's my position.
And even if it did apply, and you're here, the public
is here, you can continue it. I know that happens.
I don't think it's an issue.

CHAIRMAN LUNDGREN: Mr. Hathaway?

MR. HATHAWAY: If it was an issue, we
would waive notice of any subsequent meeting
necessary for the Board to do whatever work it needs
to do. So in other words, if the Board wants to
recess at midnight and go home and try to get a
semblance of a good night's sleep and reconvene at
some other time, we would waive notice, if the Board

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1 CHAIRMAN LUNDGREN: I think we're
2 unanimous on this, and I think let's have a motion
3 and second on this.

MR. MULLEN: I'll make a motion that we
continue to complete this evening's business as we
determine that to be past midnight or whatever it
takes.

CHAIRMAN LUNDGREN: Second?

MR. VANCAMPEN: I second.

CHAIRMAN LUNDGREN: All in favor.

BOARD: Aye.

CHAIRMAN LUNDGREN: Thank you. I believe
you are up, Mr. Hammond. But please, we all want to
go home with you at midnight.

MR. HAMMOND: Mr. Chairman and members of
the Board of Appeals, I appreciate you inviting
Coventry Cove subdivision and Rex Wilkinson with an
opportunity to voice their concern with regard to the
appeal which has been brought.

This is a beautifully planned subdivision.
If you take a look at the plan that has been made --

CHAIRMAN LUNDGREN: All right. Let me
remind you of where we are, and I was kind of
concerned this might happen, and I think it is.

Mr. Wright was raising arguments focused

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1 on whether or not Mr. McMillan had stated a claim on
2 which relief could be granted. Can you confine your
3 remarks to that subject. He used a litany of hard
4 facts to show that he didn't believe that a claim had
5 been stated.

6 MR. HAMMOND: Basically in the adversely
7 affected argument?

8 CHAIRMAN LUNDGREN: No. I think the
9 adversely affected argument is a question of
10 standing. Mr. Wright was addressing whether or not
11 Mr. McMillan had stated a claim upon which relief
12 could be granted, including the arguments about what
13 remedies, of which we've heard no comment yet
14 tonight. And then he touched on the major issues of
15 fact which he thought related to the fact that Mr.
16 McMillan had not stated a claim upon which relief
17 could be granted. I will give each side a few
18 minutes to make their summary arguments, but I don't
19 believe those have been yet made, nor are they yet
20 due.

21 MR. HAMMOND: I wish to make my arguments
22 on the merits of the appeal. So I do not have any
23 comments with regard to that issue.

24 CHAIRMAN LUNDGREN: Okay. Thank you, sir.
25 Mr. Hathaway?

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1 nonconforming use, it has to have had legally existed
2 before the current land use designation, and it has
3 to have been maintained continuously.

4 Now, if we're talking about the standard
5 of motion to dismiss, which I believe that's what
6 he's requesting, a motion to dismiss for failure to
7 state the claim, the standard is if there's not a
8 disputed fact, and under this Board's review of all
9 of the facts alleged in the appeal and that have been
10 set forth, there's no circumstance under which you
11 can find a remedy, or a finding in favor of Mr.
12 McMillan, then it would justify dismissal. But quite
13 frankly, I think that the burden is misplaced by
14 trying to argue this in the context of failure to
15 state a claim upon which relief could be granted.

16 This is an appeal of a zoning decision
17 made by the County Council. And the appeal, as
18 stated by the County's own ordinance, is that any
19 adversely affected party can put on evidence of
20 whether or not something is of -- whether or not
21 there's been an error. It's not that you have a
22 preliminary threshold you have to meet before you go
23 beyond and put on additional evidence. That's really
24 not the burden and that's not what's articulated in
25 any iteration of the rule of procedure for an appeal.

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1 MR. HATHAWAY: I guess I understood that
2 Mr. Wright was making a summation of his argument.
3 Does he anticipate arguing again in support of his
4 motion?

5 MR. WRIGHT: On the issue. One of the
6 issues is remedy. We haven't addressed that. I did
7 go through the failing to state the claim, and I
8 listed I think there were three or four items.

9 CHAIRMAN LUNDGREN: There were a bunch of
10 issues. And you sort of touched on each of the
11 highlighted issues here. And let me ask you a
12 question. I'll help you out with this so you know
13 where I would like to see this hearing go. Has Mr.
14 McMillan stated a claim upon which relief can be
15 granted? And if so, give us a short summation of why
16 he has done that.

17 MR. HATHAWAY: Okay. Morgan Code says,
18 Appellant has the burden of proving the land use
19 authority erred. That's it. Upon proof of a mistake
20 or an error, then there's adequate evidence.

21 Now, let me review briefly the points that
22 we've talked about and how we believe Morgan County
23 has erred. First, they have grandfathered a use that
24 has never been a conditional use. Definitionally, it
25 therefore, is not a nonconforming use. To be a

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1 So I guess, frankly, I'm a little -- I'm wondering
2 where it is that the County is going at this point.

3 Nevertheless, let me go back, whether or
4 not there's evidence of a mistake on the part of the
5 County. I mentioned grandfathering. It's worth
6 noting in light of the grandfather -- and by the way,
7 the testimony I thought was very compelling, Mr.
8 Larson, who conceded, basically, that the use changed
9 in '71 when the new shed was built. It's also
10 interesting Mr. Wilkinson, himself, who said, first
11 of all, "I wasn't around for four or five years, so I
12 don't know what was going on on the property. And
13 while we had equipment scattered all over it, yes, it
14 changed." Initially he said it changed when they
15 built the building for the purposes of the dairy.
16 And then later he comes in and describes how, in
17 fact, the business that he is in, while it conforms
18 with his affidavit, which supposedly has gone on
19 since 1971, notwithstanding the fact that he hasn't
20 been here during four or five of the years following
21 1971, but he did describe specifically how the use
22 changed from that of his father, which was more of a
23 plumbing contractor, to his, which is residential and
24 small commercial construction in his own words.

25 Another interesting twist, if you take a

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1 look at the Development Agreement itself -- and this
2 is another error of the County Council, and I don't
3 know how we missed it looking at it initially. But
4 if you take a look at the plan, it calls not only for
5 the existing shop, but it calls for future building
6 expansion area of the supposedly illegal shop. And
7 the development plan itself says on Page 4 of 19,
8 "Construction Business allowed only as a
9 grandfathered use is limited to a residential and
10 small commercial construction," notably, limiting it
11 to something different than what even Mr. Wilkinson's
12 father used to do on the property. "And related
13 storage, equipment, loading and unloading areas, and
14 building expansion within the areas noted in the plat
15 only."

With all due respect, the County erred
when it allowed the expansion of the -- even if it
was a conditioned use, which it wasn't, it erred
further in allowing it to be expanded under the
Development Agreement as set forth in this plat.

There's another. Counsel talks of the
fiscal errors. As noted, that's required. Now we
tried to revisit the calculation, that I think was
missed by Counsel, as he reviewed, on page -- well,
it's not marked as a page. It's one of the exhibits

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to the Development Agreement, Exhibit E. You move
beyond the \$4,650 referred to by Counsel, there's
several things that simply cannot be calculated.
There are unknown variables including general sales
tax population distribution, county option 1/4
percent sales tax, point of sale tax revenues,
transient room tax revenues, and a whole host of
other matters that render the calculation impossible
to finally determine what the impact is.

Again, as noted, the school district -
which represents a substantial portion of property
taxes, as everybody knows - itself complained of the
significant impact, negative impact that the
subdivision would have. Again, discounted. Add to
that the fact that 19 homes rather than 18 were added
into the mix. It's rife with errors on the part of
the County.

The water issue. It's an issue that could
have been ruled out, but simply nothing was done.
Another error on the part of the County. Question of
the affordability. The County simply erred in its
determination of whether or not this was an
appropriate location for affordable housing. It
wanted to be -- it wanted to achieve the objective of
the PUD Overlays, which was to be consistent with the

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1 Morgan County General Plan which it says, town,
2 village, city. Town and village. And
3 notwithstanding the fact it may about the Cottonwood
4 subdivision, as we've heard, the smallest lots there
5 are somewhere around 13,000 square feet, whereas we
6 are talking around 3,000 to 9,000 square feet in this
7 subdivision. It was on the basis of these mistakes,
8 that the 37 percent was awarded that enabled the
9 Wilkinsons to have the hyper density that's resulted
10 in compacting 18-odd homes into just over five acres.

So I believe that there is substantial
evidence, even using Counsel's interpretation of what
the standing is, that there have been errors that
ought to be considered. There's clearly issues of
fact of whether or not errors occurred that ought to
be considered by this Panel.

Now, Counsel made some comments about the
remedy. And, again, I harken back to the rules on
appeal states, 16-06-240, the option is to determine
whether or not the governing board erred. Whether it
made a mistake. And if it did, then the matter needs
to be sent back, and it needs to be sent back with
whatever recommendations, based on the findings of
fact, are appropriate. And that is the remedy that's
provided under the County's own rules. And I'm sort

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1 of perplexed that the County isn't arguing the rules
2 that it's propagated by this remedy with respect to
3 any appeal of the decision. Not unlike a court
4 appeal, it can be reversed and remanded, sent back to
5 be done right. It may be that under circumstances,
6 many of these things cannot be done right. Sometimes
7 that's why things aren't done right the first time is
8 because it's not possible for them to have been done
9 right. So I would respectfully have to disagree that
10 there have been -- that there's substantial evidence,
11 considerable evidence that supports the conclusion
12 that the County erred in approving this subdivision.
13 And I've highlighted a few briefs. But as regards to
14 this motion, I think there is substantial evidence.

CHAIRMAN LUNDGREN: Any questions for Mr.
Hathaway? Mr. Wright, I'll give you the opportunity
to respond, but I'm going to ask you to confine your
remarks to the remedy issue alone.

MR. WRIGHT: The issue of remedy, it's
probably very clear that I'm not sure that this Board
has -- the concern I have is if this is thrown out,
it's just not a valid subdivision. The issue of
remand is probably -- I don't believe there's
evidence to support the action to send it back.
That's my first position. But if you find that

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1 there's an error, then the remedy would be to remand
2 it, but the question would be as to what? So to do
3 what? And that becomes the issue here.

4 Fiscal impact, I don't believe that's an
5 error that affects this at all. There's not relief
6 based upon that. I don't know of where that would
7 cite to. We can go through those calculations, but
8 again, we've been there.

9 The nonconforming use, we've talked about
10 that. We've talked about the affordability, and --

11 CHAIRMAN LUNDGREN: Well, I'm going to cut
12 you off here. We have discussed those things. We
13 have not spent much time talking about remedies. So
14 it is your position that this Board, "if," that's a
15 big "if," we find that the County Council committed
16 some errors, that it's our obligation to make those
17 findings and conclusions of law, remand the matter
18 back to the County Council to remedy those issues?

19 MR. WRIGHT: I think I would agree with
20 that.

21 CHAIRMAN LUNDGREN: Mr. Hammond, can I
22 hear your comments on that?

23 MR. HAMMOND: I think that the Board has
24 an opportunity to decide if there are any errors or
25 not, if it gets past the jurisdictional question.

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1 decide whether or not it was correct. And if the
2 determination is that it was correct, fine. If the
3 determination is incorrect, it goes back and they can
4 figure it out. But I think that's what the rule
5 says. That's where the job of this panel is.

6 CHAIRMAN LUNDGREN: Isn't that remanded.

7 MR. HATHAWAY: Oh, yes, it's remanded.

8 But I think I understood Mr. Hammond to be suggesting
9 that you need to prepare a laundry list of things
10 they need to go fix. And they may be able to divine
11 it from the findings and facts and conclusions of
12 law, that those just need to support your conclusion
13 whether or not they were correct.

14 CHAIRMAN LUNDGREN: Just so that we're
15 clear on this, Mr. Hammond, let me parrot back what I
16 thought I heard you say. I thought I heard you say
17 that if we found issues that the County had erred, we
18 need to identify those issues.

19 MR. HAMMOND: Yes.

20 CHAIRMAN LUNDGREN: And then send our
21 issues with our findings and conclusions back to the
22 County Council. Did I understand that correctly?

23 MR. HAMMOND: Yes. That's what I believe
24 would be the best thing to happen because if this
25 body were to decide that it was inappropriate and

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1 And that it would need to identify the exact errors
2 and then remand this appropriately. But I don't
3 think that it would be helpful to the County Council
4 to just dismiss it entirely. I think that the County
5 Council needs direction as to what the perceived
6 errors might be.

7 CHAIRMAN LUNDGREN: Mr. Hathaway?

8 MR. HATHAWAY: I would just add by
9 reading, I'm trying to make the job of the panel a
10 little easier. This is what the rule says. This is
11 the rule that has been provided to us that governs
12 this proceeding.

13 CHAIRMAN LUNDGREN: Well, rather than
14 reading us the rule --

15 MR. HATHAWAY: But I think there's one
16 point that addresses specifically the question.

17 CHAIRMAN LUNDGREN: Go ahead.

18 MR. HATHAWAY: And that is, "The Board of
19 Appeal shall review the land use authority's decision
20 administering and interpreting the Land Use Ordinance
21 de novo," we've talked about that, "and shall
22 determine the interpretation and application of the
23 Land Use Ordinance." I think that's where it ends.
24 I don't think you have to get into the Planning and
25 Zoning business. I think, though, that you just

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1 just leave it at that, that doesn't give the County
2 Council any direction as to where to go from there.

3 CHAIRMAN LUNDGREN: Well, we certainly
4 want to provide as much finality and clarity as we
5 can. And Mr. Wright, we're on the same page still
6 with that issue?

7 MR. WRIGHT: I think so.

8 CHAIRMAN LUNDGREN: Board members? Okay.
9 Now, do either of the three lawyers, have anything
10 substantive to put on?

11 Mr. Hammond, do you have a case in chief
12 you want to present, new information which we have
13 not heard?

14 MR. HAMMOND: Yes. I don't have any
15 witnesses, but I -- the notice that I was provided
16 said that Coventry Cove and Rex Wilkinson would have
17 their 30 minutes. I don't intend to take 30 minutes,
18 but I think we've been parroting it down to separate
19 issues. And I propose to this body that we give each
20 attorney "X" amount of time, and that's it for
21 tonight.

22 CHAIRMAN LUNDGREN: And I appreciate the
23 suggestion. But what I want to know is if you have
24 information that you want to bring to the attention
25 of this Board which we have not already heard in one

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1 fashion or another. Is there something new that we
2 need to consider?

3 MR. HAMMOND: Well, I have prepared an
4 argument which I would like to make. And in
5 fairness, I believe that some of that is duplicative,
6 but Mr. Wilkinson hasn't been provided with any time
7 yet, except for on piecemeal issues.

8 CHAIRMAN LUNDGREN: And that's my
9 question. If Mr. Wilkinson wants to -- we certainly
0 want to hear from him if he has something to add to
1 what we've heard already tonight. And if that's the
2 case, please continue.

3 MR. HAMMOND: Thank you. I think it's
4 very important for the Board of Appeals to remember
5 what its duties are here, and to follow the
6 Development Agreement, to look at the PUD Overlay
7 Ordinance, and to directly apply the PUD Overlay
8 Ordinance to the Development Agreement and see if
9 this Board feels like there are any errors in how the
0 County Council applied that.

This, as I look at the PUD Overlay
Ordinance, Counsel for the Appellant has read the
introduction of the purpose of the PUD Overlay
Ordinance in talking about the General Plan, but has
not gone through all of the elements of the purpose

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of the PUD Overlay Ordinance. And rather than read
all of that to you, I would just summarize that it's
to allow creative use of land; permit developers to
vary the density, architectural style, and land use
on a project-by-project basis; to permit developers
to locate the various features of their development
in harmony with the natural features of the land; and
to the greatest extent possible of the existing
landscape features, watershed, animal habitat, et
cetera, and to encourage preservation and protection
of agricultural usage through the emphasis of the
right to farm, and providing buffering between
existing agricultural uses and higher density uses.

I think if you go through the Development
Agreement, you will find that the County Council
applied all of these purposes to this subdivision.
The Coventry Code subdivision is a mixed use
subdivision and it has open space of 40 percent, just
as the ordinance requires. There's 18 lots, single-
family residential, construction office, bed and
breakfast. These are creative uses of land. The PUD
Overlay Ordinances are designed to put these mixed
uses together and the County Council found that they
were appropriate.

The Development Agreement provides for the

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1 school district employees to purchase lots. The
2 Development Agreement has a substantial fiscal impact
3 Analysis that was prepared by an outside agency, by
4 expert economists. It has the protection of
5 agriculture in the Development Agreement. There's
6 infrastructure guarantees, bonds, and so forth.
7 There's architecture and design limitations in the
8 Development Agreement. It even goes to the point of
9 talking about lighting, the street lighting.

10 The Development Agreement talks about
11 sewage disposal, a monument that needs to be erected.
12 It has a certificate from the sheriff's office. It
13 talks about in the event of default, if the developer
14 doesn't follow through, signage, landscaping,
15 homeowner's association, transportation, it has
16 covenants, conditions and restrictions, a five-foot
17 public trail. The environmental standards are set
18 forth in that; public utilities, watershed
19 protection.

20 This Development Agreement is one of the
21 most lengthy agreements I have ever worked with.
22 It's not just a form, which I see many of the cities
23 in Davis and Weber Counties just kind of use a form,
24 they throw in the name of the subdivision, the name
25 of the developer, require a bond, and they're done.

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1 This is 19 pages long, it has 14 exhibits, there's
2 over 50 pages of exhibits. The details are amazing,
3 and I commend the County Council for the time and
4 effort that they took to put this together. The
5 floor plans are in there, the geotechnical study is
6 in there, and it would be very hard-pressed for me to
7 say that the County Council did not spend time and
8 effort trying to apply the ordinances of Morgan
9 County to this particular development.

10 With regard to the fiscal impact analysis,
11 the Wikstrom Economic and Planning Consultants
12 provided this. This was not Mr. Wilkinson who
13 provided it. This was an outside agency. And for
14 Counsel to suggest that Mr. Wilkinson was involved in
15 any lies regarding this, is inappropriate.

16 This Development Agreement goes to great
17 lengths to apply the PUD Overlay Ordinance. I
18 understand that that ordinance has been rescinded,
19 basically. Perhaps that ordinance doesn't work for
20 Morgan County in all situations, but it was the law
21 at the time that Mr. Wilkinson made his application.
22 And you, as public officers, have the duty to put
23 aside your personal views and concerns, but you need
24 to take a look at the ordinance, look at the
25 Development Agreement, and determine for yourself if

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<p>SHEET 27</p> <p>1 that Development Agreement applies to that ordinance. 2 Now, there's been a lot said about 3 grandfathering and the shop. The affidavit is very 4 clear that the usage of that property dates back to 5 the 1940s. The Land Use Management Code wasn't 6 adopted until the '60s; therefore, this is a classic 7 example of a legal nonconforming use, and I think 8 that the County Council appropriately addressed that 9 issue, as well.</p> <p>10 Another important thing for this body to 11 consider is that many people have already purchased 12 lots out there. Many people are relying upon the 13 fact that this subdivision was authorized by the 14 County Council --</p> <p>15 MR. HATHAWAY: I'm sorry. I've got to 16 object. There's no evidence of this. There's been 17 no evidence presented before the Board, and I don't 18 know that it's necessarily relevant. It's not a 19 defense as to whether or not a mistake was made by 20 Council, and I would respectfully request that we 21 eliminate any further discussions.</p> <p>22 MR. HAMMOND: I would be happy to put on 23 evidence to that effect, and I would proffer evidence 24 from Mr. Wilkinson who is here today, and would 25 testify, if called, that lots have been purchased up</p> <p>209</p>	<p>1 everything that is presented to the Board can be 2 provided as a factor. I don't see why that would be 3 omitted as evidence. I think that this Board needs 4 to take a look at everything.</p> <p>5 CHAIRMAN LUNDGREN: So are you saying, Mr. 6 Hammond, that, hypothetically speaking, if the 7 developer gets approval from a county council and 8 managed to sell out his project within the 30-day 9 period of the appeal, somehow the project then has 10 some vested right to maintain and we can't overturn 11 errors of the Council?</p> <p>12 MR. HAMMOND: No, I'm not saying that at 13 all.</p> <p>14 CHAIRMAN LUNDGREN: Okay. Go ahead, sir.</p> <p>15 MR. HAMMOND: It has been stated that 16 there's a possibility of precedent being set with 17 regard to this subdivision. And clearly, that's not 18 something for this body to be concerned with because 19 the PUD overlay zone Ordinance, itself, has repealed; 20 and therefore, there would be no precedence set. I 21 don't believe that hyper density is an appropriate 22 way to characterize this subdivision because it falls 23 within the PUD overlay zone itself.</p> <p>24 That's what PUD Overlay Zones are for. 25 They are intended to provide additional density.</p> <p>211</p>
<p>1 there.</p> <p>2 CHAIRMAN LUNDGREN: What would the 3 relevance of that testimony be to the issue before 4 this Board?</p> <p>5 MR. HAMMOND: Well, the relevance is that 6 there are other people who are affected by this, not 7 just Mr. Wilkinson and Coventry Cove; but those 8 people who have purchased lots. If Appellants 9 decided that they didn't think the lots being 10 purchased were appropriate, they should have brought 11 an injunction.</p> <p>12 CHAIRMAN LUNDGREN: Is it the duty of this 13 Board, do we have a statutory duty to consider how 14 many lots have been sold and whether or not we should 15 render our decision as to the action of the County 16 Council?</p> <p>17 MR. HAMMOND: I think that this Board has 18 the duty to look at all facts that are brought 19 forward.</p> <p>20 CHAIRMAN LUNDGREN: Is there an ordinance 21 or a statute you can point to that says that somehow 22 the purchasers of a lot, however many lots may be 23 sold, are to affect our decision; that's a factor in 24 our consideration?</p> <p>25 MR. HAMMOND: Well, I think that</p> <p>210</p>	<p>1 That's when we talked about bonus density, it's an 2 incentive for a developer to provide certain things; 3 trail, open space, et cetera. And because those 4 things were provided, higher density was allowed. 5 That's what the purpose is. And when you call it 6 higher density, you're only looking at just the lots 7 themselves. But when you look at the subdivision as 8 a whole, it isn't as high a density as Counsel would 9 have this body believe.</p> <p>10 When we first started tonight, Mr. 11 Chairman stated that this body needs to look at 12 whether or not the County Council abused its 13 discretion. I don't think that there has been 14 anything here that would meet that high of a 15 standard. The County Council took many, many hours 16 in meetings, staff time, in order to arrive at the 17 decision which it did. I don't see that there is any 18 ordinance here which has been abused, and I believe 19 that the County Council has done their duty with 20 regard to this particular development.</p> <p>21 This body has the duty to enforce the 22 ordinances, and we ask you to carefully look at the 23 Development Agreement, as well as the PUD Overlay 24 Ordinance and uphold the decision of the County 25 Council.</p> <p>212</p>

1 Do you have any additional questions for
2 me?

3 MR. MULLEN: I have one. In looking at
4 the PUD Overlay Provisions here, on Section
5 16-35-030; Conditional Uses and Other Uses.
6 Paragraph Number 2. "Subject to the provisions of
7 Sections 16-35-030(2)(a) and (b)," which are below,
8 "Residential or commercial uses not otherwise allowed
9 within the underlying zone district(s) proposed by
0 the PUD concept plan and PUD overlay zone application
1 may be allowed as permitted or conditional uses if
2 recommended by the Planning Commission and approved
3 by the County Council based on specific findings,
4 citing to plan provisions, that the residential or
5 commercial mixed use is consistent with the County
6 General Plan goals, policies and objectives, the
7 policies and code provisions for PUDs, and is in
8 harmony with the community character. Allowed mixed
9 residential and commercial uses and any conditions
0 associated therewith shall be specifically referenced
1 within an executed Development Agreement."

Okay. I don't believe that that has been
accomplished. I don't think that the County Council
provides specific findings citing planned provisions.
And secondly, when you go to number (a) below there,

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"In RR, R1, RM, and A20 residential zone districts,"
which is applied to residential districts, "Permitted
and conditional uses identified in the Neighborhood
Commercial (C-N) District may be allowed, except for
grocery stores"; ta-da, ta-da, ta-da.

If you go to the (C-N) District, which
would be under Section 24 of the Land Use Plan, and
go to -- let's see. The pages aren't numbered, I'm
sorry. It would be 3 and it would be 3.N, as in
November, under -- it says "Wholesale Trade and
Warehousing." I'll give you a moment to find that.
Okay.

MR. HAMMOND: Go ahead.

MR. MULLEN: Okay. Under 3.N, "Wholesale
Trade and Warehousing," and you come down to
"Warehousing and Storage Services," and we're talking
about storage services here for the storage shed, and
under the (C-N) designation, that's not allowed. And
further, under a general contract and subcontractor
to construction services, which are under 3.O, just a
few under that, and also under the C-N designation,
those are not allowed in that zone.

And my question for the County Councilor
is how did we end up with storage units, which were
not allowed in a PUD overlay zone because the

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1 underlying zone is -- it was A-20, it's R-1 and
2 R-120. And so I'm confused as to how that occurred.
3 And I need to be educated on that because I couldn't
4 find anywhere where that was spelled out in any of
5 the meeting notes or anything like that. It was just
6 proposed and it was accepted, and I don't see the --

7 MR. WRIGHT: Let me -- and your question
8 is to me, but to Mr. Hammond, as well.

9 MR. MULLEN: Sure. This is generally,
10 where did it come from?

11 MR. WRIGHT: Which storage units are you
12 talking about?

13 MR. MULLEN: The storage units that are
14 being proposed as part of Coventry Cove. The storage
15 units themselves. Not the shop or the other thing,
16 but the storage units themselves.

17 MR. WRIGHT: You know, that issue hasn't
18 been raised, so I would like to take a minute,
19 please.

20 MR. MULLEN: Please do.

21 MS. CHRISTENSEN: I believe if you'll look
22 in the back of the resource documents, you had an
23 ordinance change that allowed storage units as a
24 conditional use. And I think you just didn't get the
25 codified version. But I think it's in the back of my

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1 General Plan book.

2 MR. HAMMOND: And, Mr. Mullen, while they
3 are looking at that issue, I would like to respond to
4 your first question --

5 MR. MULLEN: Please.

6 MR. HAMMOND: -- that you asked if there
7 were any findings made by the County Council with
8 regard to the specific findings and citings of the
9 plan. And I believe that Exhibit B of the
10 Development Agreement accomplishes this. Exhibit B
11 was attached as the recommendation of approval from
12 the Planning Commission.

13 MR. MULLEN: If I can find it here, I want
14 to respond to that. Go ahead.

15 MR. HAMMOND: Exhibit B states, "The
16 Planning Commission recommends approval of the Final
17 Plat to the County Council of the following findings
18 and conditions." And it goes through several
19 findings regarding the creative use of land, the 40
20 percent open space, the variety of density, the
21 harmony of the various features, the watershed and
22 habitat encourages preservation. And so I think that
23 the County Council adopted the Planning Commission's
24 findings.

25 MR. MULLEN: Let me respond to that, if I

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1 may. As I read through that, I don't see any citations
2 in there specifically. And, basically, most of
3 what's in there parrots exactly what's in the PUD
4 overlay zone that says, "Creative use of the land,"
5 and so forth and so on, and it goes through. It
6 basically reiterates what it said in there without
7 giving any specific citations to the General Plan. I
8 have given citations tonight in the General Plan of
9 where these things have not been met.

10 MR. HAMMOND: Number 2 of the Findings
11 does reference the General Plan. It doesn't
12 reference specific Code sections.

13 MR. MULLEN: It doesn't have the citations
14 in it.

15 MR. HAMMOND: Right. But it does
16 reference the General Plan. And I believe that both
17 the Planning Commission and the County Council felt
18 like it complied with the General Plan.

19 MR. MULLEN: I understand that they felt
20 that way, but I'm just saying the citations weren't
21 there that were required. And furthermore, when the
22 application was made by the developer, there was a
23 requirement to provide certain things, as well -
24 let's see if I can find it here - in regards to those
25 citations, the citations in the General Plan where they

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1 Mullen, but I will represent to you that in County
2 Ordinance C-003-10, which was in August of 2003,
3 there was a change to Chapter 12 which has been
4 codified as the section that it talks about
5 commercial districts; and it includes, specifically,
6 a provision for storage units. And, in fact, I'll
7 show you, if you would like to take a look at it. It
8 goes in all commercial districts; C-B, C-N, C-S, C-H,
9 C-G, M-G, and so on. It is permitted in the M-D and
10 M-G zone, but it is conditional use in this C-N.

11 CHAIRMAN LUNDGREN: Is that the same for
12 general contractor and subcontractor construction
13 services?

14 MR. WRIGHT: This ordinance only speaks to
15 the storage units.

16 CHAIRMAN LUNDGREN: Okay. Mr. Mullen's
17 request also went to 3.0, "General contractor and
18 subcontractor construction services," not being
19 permitted in the --

20 MR. WRIGHT: Correct. And I believe
21 that's correct the way that is, which is why the
22 grandfathered provision.

23 CHAIRMAN LUNDGREN: Okay. Do you have
24 anything else, Mr. Hammond?

25 MR. HAMMOND: I do not.

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1 were in compliance. And those were not provided in
2 the initial application, as I read through this.

3 Generally, I guess, I feel from what I see
4 here is that it is probably good reason that that PUD
5 overlay zone has been done away with because it's
6 very confusing and very difficult to deal with on all
7 sides. Notwithstanding, I think there have been
8 errors on, perhaps on both sides, as I try to digest
9 this volume of information to work from. And I just
10 don't think that the citations have been provided in
11 the information necessary to convince us of that, or
12 convince the County Council that it's substantial
13 enough to merit that in some cases.

14 That's all. Thank you.

15 MR. HAMMOND: I would move to submit that
16 it was not an abuse of discretion, that they did a
17 very good effort in order to reference the General
18 Plan and findings.

19 Again, I am done making my statement, and
20 I know that the County Attorney is looking up your
21 other question.

22 MR. WRIGHT: I have a response.

23 MR. HAMMOND: Okay.

24 MR. WRIGHT: And I haven't had a chance to
25 go through and find exactly the language for Mr.

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1 CHAIRMAN LUNDGREN: Okay. Members of the
2 Board?

3 MR. VANCAMPEN: I've got a question about
4 the issue of the grandfathered shop. All through the
5 evening, we've heard arguments about the whole
6 property being used as parking construction
7 equipment, or unloading pipes, or there was a
8 different shop at one time. And so my question is,
9 how can we siphon that down to one shop that Mr.
10 McMillan himself told us was purchased after he
11 initiated the application process; and which was in
12 this use as functionally a messy aircraft hanger, and
13 which he himself has made changes to and caused it to
14 become a shop for construction? And particularly in
15 light of the fact, the bulk of property that we're
16 talking about, now no longer wishes to be used as
17 construction, but will be primarily residential, or
18 bed and breakfast, or storage units? How can we make
19 that leap? I'm not quite seeing that.

20 MR. HAMMOND: The first thing of that, a
21 legal nonconforming use can always be given up by the
22 land owner. And so to convert it to the residential,
23 the open space, and the other usages, that's not a
24 problem.

25 With regard to the shop itself, I think

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1 it's very important to review the affidavit that Mr.
2 Wilkinson signed, and which was basically a summary
3 of his testimony to the County Council, that there
4 were metal building fabrications, sidewalk
5 installations, septic systems, excavation equipment,
6 repair pump house construction, all of that was
7 conducted in that particular shop. And those are
8 consistent with the construction use; which is
9 asserted at this time.

0 CHAIRMAN LUNDGREN: May I ask a follow-up
1 question as to what you just inquired?

2 MR. HAMMOND: Yes.

3 CHAIRMAN LUNDGREN: It was my
4 understanding that Mr. Wilkinson testified that for a
5 number of years, all that was occurring inside the
6 shop was work that was related to the irrigation
7 system; is that correct, Mr. Wilkinson?

8 MR. WILKINSON: In the what?

9 CHAIRMAN LUNDGREN: That for a number of
10 years, the work that was going on in the shop had to
11 do with the Wilkinson Irrigation Company.

12 MR. WILKINSON: The water company?

13 CHAIRMAN LUNDGREN: The water company; is
14 that correct?

15 MR. WILKINSON: There was still -- when I
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1 fuselage for an airplane in it, it was a mess, there
2 were calf bones, or some other bones that had been
3 constructed for the farm, there was a rough-in
4 bathroom but you didn't quite know how to use it
5 because it was not private. There was a welding
6 facility that had a fire that rafters were burned.
7 There was a motor lift and then some parts and stuff.
8 There was no office, there was cold water, and there
9 was power in the building.

10 Now, I didn't really see anything there
11 that was related to a construction business.

12 MR. WILKINSON: Well, did you want a full
13 inventory? I mean --

14 MR. VANCAMPEN: Well, no. I assume when
15 you're talking about a construction business, that
16 there's construction business stuff in there.

17 MR. WILKINSON: The thing that you've got
18 to consider is that I'm talking this piece of ground
19 as a whole, this piece of ground as a construction
20 oriented piece of ground. And there's ample people
21 still alive that will verify that. And it's always
22 been that way since 1940. Whether Mike believed it
23 or not, that's the case. And I can get many
24 witnesses that can tell you that. And Mike knows it
25 himself, if he'll just admit it.

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moved into the shop area myself, there was plumbing
still in there that belonged to the Wilkinson Water
Company.

CHAIRMAN LUNDGREN: And as far as you
know, immediately prior to you taking possession of
it, for some period of time it was just water company
work that was being done.

MR. WILKINSON: Oh, no. It was a
combination of dairy and the construction company, a
combination of everything. Dad had his stuff in
there sometimes. The pipe was there, that I know of,
you know. When I got there, there was pipe there.

CHAIRMAN LUNDGREN: I'm looking for
clarification on what was actually going on in the
building. It was my understanding, you had
testified, that prior to you purchasing the shop,
that the shop had been used only for work in
conjunction with the irrigation company.

MR. WILKINSON: No. That's not --

MR. VANCAMPEN: Let me follow up to that,
then, if I may.

CHAIRMAN LUNDGREN: Well, yes. Go ahead.

MR. VANCAMPEN: Okay. This is for you
again, okay? You said, and I wrote this down as you
said it, that when you bought the shop there was a

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1 CHAIRMAN LUNDGREN: Who was doing the
2 construction related work prior to your purchasing
3 the shop a couple of years ago?

4 MR. WILKINSON: Okay. Now, which shop?
5 In the shop itself, that's there?

6 CHAIRMAN LUNDGREN: We're talking about
7 just in the shop itself.

8 MR. WILKINSON: I did some fabrication of
9 a pump house. I did that for sure myself.

10 CHAIRMAN LUNDGREN: Well, prior to
11 purchasing it?

12 MR. WILKINSON: Yes. I did, for my dad.

13 CHAIRMAN LUNDGREN: When your dad was
14 still alive?

15 MR. WILKINSON: He put the systems, the
16 pipelines in. We built the cisterns.

17 CHAIRMAN LUNDGREN: Let's narrow it down
18 and make it a little easier question. Say the
19 previous two or three years to you purchasing the
20 shop, what business was happening in that shop?

21 MR. WILKINSON: It was mainly the dairy.

22 CHAIRMAN LUNDGREN: Okay. All right. Do
23 you have any other questions on this?

24 MR. VANCAMPEN: Nope.

25 CHAIRMAN LUNDGREN: Do you have any

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1 follow-up on that, Mr. Hammond?

2 MR. HAMMOND: No, I don't.

3 CHAIRMAN LUNDGREN: Okay. Did I
4 understand that this was your closing argument?

5 MR. HAMMOND: Yes.

6 CHAIRMAN LUNDGREN: Okay. Since you've
7 had an opportunity to present yours, we'll give the
8 County and Mr. McMillan a chance to go. I
9 understand, Mr. Hathaway, you prefer to be last under
10 this circumstance?

11 MR. HATHAWAY: Yes. Thanks.

12 CHAIRMAN LUNDGREN: Mr. Wright, the floor
13 is yours, sir.

14 MR. WRIGHT: Thank you very much. I won't
15 go into the jurisdictional issues, they've been
16 submitted. I've spoken a lot about that. I want to
17 focus on just this last issue. I'm concerned a
18 little bit about the affordable housing issue, and I
19 think when your findings and facts come forward, I
20 submit that you won't find an error of the nature
21 that Counsel suggested that requires a remand.

22 I don't believe that the affordable
23 housing issue, as I look through the General Plan and
24 as I read the PUD overlay -- and I would encourage
25 you to read very carefully the PUD overlay as it

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1 unique that you have housing that part of the
2 development plan says this is what you're going to
3 build. You're not going to build the \$250,000 or
4 \$300,000 or \$500,000 home. You're restricted by the
5 Development Agreement. It's restricted by the lot
6 size. I just don't believe that's an error. I don't
7 believe the fiscal impact issue is an error, that you
8 can make findings of fact that there was an error
9 with respect to that.

10 I want to be clear, too, on my
11 understanding of this issue about affordable housing
12 encouraging town centers. My understanding is that
13 town center was not established at the time this
14 development went through that would have prevented or
15 suggested otherwise here. It may have been after the
16 fact. But at the time this went through, I don't
17 believe that's an issue, as well. I don't find that
18 to be an error, but I want to make sure that that's
19 clear in the record, as I understand it; that the
20 town center definition was not established at this
21 time. And I'll look to Sherrie. Is that correct?

22 MS. CHRISTENSEN: It was under review. I
23 believe that started, but past the time; it was
24 definitely adopted after the preliminary plat had
25 already been approved.

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1 relates to the use and the consistency with the
2 General Plan and its use. And I would also encourage
3 you to take a look at Chapter 9 and understand that
4 the General Plan sets forth goals, objectives, and
5 policies. I don't think you're going to find any
6 inconsistency because I would hate to read this
7 General Plan as saying that the only way you can have
8 affordable housing is with a deed restriction. That
9 would be a terrible precedent to set.

10 It talks about, in the housing, it talks
11 about a number of different things. "Afford
12 reasonable opportunity for a variety of housing types
13 to be developed that will serve the community."
14 That's precisely what this is. It is a type of
15 residential housing that will serve a portion of our
16 community that is very critical, very important. And
17 if you go down and you look at those objectives, and
18 Objective 1.3 that was brought out, work with
19 property owners and developers to encourage the
20 development of the amount and type of housing, it
21 accomplishes the community General Plan goals,
22 including, but not limited to Development Agreements,
23 in which we look at deed restrictions. One way to do
24 it. But it is not the only way to do it. And this
25 type of housing, because of the -- I think it's

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1 CHAIRMAN LUNDGREN: Mr. Brown has a
2 question.

3 MR. BROWN: Are you talking about the
4 Mountain Green Master Plan Committee, what they
5 defined, or the General Plan? Because we did that in
6 2000. We identified the town centers in 2000. Are
7 you talking about the Mountain Green Master Plan?

8 MR. WRIGHT: I'm talking about the general
9 planning, and it was a question that I had raised
10 earlier with Sherrie, and that was my understanding
11 of what she had indicated.

12 MS. CHRISTENSEN: Well, I guess I would
13 just clarify that what was adopted was the 2005
14 update of the Mountain Green area plan, which
15 established their central development.

16 MR. BROWN: Oh, okay. Now, that makes
17 more sense. But the General Plan was presented to
18 the County Council in 2000 or 2001, which we adopted
19 after we did that Chuck Klingenstein recommendation.

20 MR. WRIGHT: I think that's correct. In
21 fact, it was 1999 that the General Plan by Mr.
22 Klingenstein was adopted.

23 MR. BROWN: Well, then we rehashed it and
24 rehashed again, and then finally submitted it to the
25 County Council. I thought it was a little later than

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1 that, but that's a moot point.
 2 MR. WRIGHT: I think it was in December of
 3 '99.
 4 MR. BROWN: Okay.
 5 MR. WRIGHT: All right. So I didn't want
 6 the town center to be an issue. I don't believe the
 7 affordability is an issue. Again, I think if you
 8 will take a look at this General Plan, and you look
 9 at it as a whole, I believe you will be convinced, as
 0 well.
 1 The fiscal impact, we talked about that.
 2 The expansion of nonconforming use. Let
 3 me just touch briefly on that again. I think the
 4 issue is do we have a grandfathered use that's going
 5 on? We talked about the use. For the testimony that
 6 I've heard is that the use was there and it was
 7 continuous and it may have been in different stages
 8 at different times. But that's what our affidavit
 9 establishes. That's what it shows; that that
 0 construction use was there and was there
 1 continuously.
 2 CHAIRMAN LUNDGREN: I have a question for
 3 you.
 4 MR. WRIGHT: Okay.
 5 CHAIRMAN LUNDGREN: Is the maintenance of
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1 public, but it serves a segment of the public. So...
 2 CHAIRMAN LUNDGREN: And where can one
 3 perform works on a public facility? Is that limited
 4 to commercial zones?
 5 MS. CHRISTENSEN: No. I believe utility
 6 companies are allowed in all zones. I would have to
 7 research that a little bit.
 8 CHAIRMAN LUNDGREN: But it's not
 9 considered a commercial use that would require a
 10 conditional use permit?
 11 MS. CHRISTENSEN: I don't believe so, no.
 12 CHAIRMAN LUNDGREN: All right.
 13 Mr. Wright, please continue.
 14 MR. WRIGHT: Okay. I think the last issue
 15 was this conforming issue. I believe that the
 16 nonconforming and grandfathered use comes into play.
 17 We've raised our defense. We believe this use has
 18 been continuing in the community for some time, and
 19 that it's very inappropriate because of the
 20 prejudices as we've indicated to this point, and at
 21 this late date, to come in and say, "Oh, can't do it.
 22 Sorry. Can't have the business." And I'm not going
 23 to rehash the proximity and what's going around this
 24 property, as well. I just don't believe that they've
 25 stated a claim; that is, that there's been an error
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an irrigation district an agricultural use, a
 commercial use, or some other kind of use?
 MR. WRIGHT: Tell me again.
 CHAIRMAN LUNDGREN: The maintenance of an
 irrigation district; what's the nature of that? Is
 that a commercial use? Are you required to have a
 commercial use permit to conduct work that maintains
 an irrigation ditch or is that an agricultural
 permitted thing? Sherrie, can you answer that, or
 Mike Brown?
 MR. BROWN: I think you're confused. I
 don't think it was an irrigation use, it was a water
 company for culinary use. Is that correct?
 MR. WILKINSON: That's correct.
 CHAIRMAN LUNDGREN: Okay. And I probably
 misunderstood you, Rex. My apology. I'll rephrase
 the question with the same thing. Is maintenance of
 a residential water company considered a commercial
 use, industrial use, an appurtenant use to
 residential area, or is it just not classified?
 MS. CHRISTENSEN: Public facility.
 CHAIRMAN LUNDGREN: It's a public
 facility?
 MS. CHRISTENSEN: Well, it would be a
 quasi-public facility. I mean, it's not owned by the
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1 sufficient that would justify a remand for the
 2 reasons I've indicated.
 3 And I would say, and agree with Mr.
 4 Hammond, our community needs housing that's
 5 affordable. We need a variety of housing. We need
 6 to bring it into our community. People are our
 7 greatest asset. And this is a unique development and
 8 will bring in people who will be beneficial to the
 9 community. And, you know, a small lot? People have
 10 that. People live in apartments that are shoved
 11 together without yards. This is so much in the way
 12 of a great thing. The prices will be low, the market
 13 will maintain that because of the development and
 14 because of the nature of it, which I think is
 15 precisely what we have tried to accomplish.
 16 CHAIRMAN LUNDGREN: Questions from the
 17 Board? Thank you, sir.
 18 Mr. Hammond, I don't think we're going to
 19 make it home with you tonight.
 20 Mr. Hathaway.
 21 MR. HATHAWAY: I'm reading from the Morgan
 22 County General Plan on Page 15.
 23 MR. MULLEN: What page, sir?
 24 MR. HATHAWAY: 15. Policy 3.1.2, "Towns,
 25 villages, small villages, and with their associated
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1 centers and resorts are as follows:" Morgan City,
2 they have their own determinations; Mountain Green
3 town center; Trappers Loop Road and Old Highway.

4 Much has been said about the
5 grandfathering use. The affidavit was signed on May
6 18, 2005, the day after this subdivision was
7 approved. The affidavit, itself, where much weight
8 has been placed, obviously wasn't relied on by any
9 governing body in approving this subdivision.
10 Further, just read what the affidavit says:
11 Residential and small commercial construction, not
12 pipeline maintenance.

13 And finally, Morgan Code 16-35-010, it has
14 been read around, it's been run over, but you just
15 can't get around the impact. And to read it out of
16 it really takes the meaning out of the PUD. I'll
17 tell you what it takes the meaning out of; it takes
18 the meaning out of the General Plan of Morgan County.
19 And the language I'm referring to is in the first
20 paragraph under 010. "And to ensure compatibility
21 with the surrounding neighborhoods and environment,
22 consistent with the Morgan County General Plan."

23 And there underlies the problem. And the
24 County just, unfortunately, made too darn many
25 mistakes in trying to cram this singularly smallest

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1 question. Who prepared the affidavit for Mr.
2 Wilkinson?

3 MR. WRIGHT: I prepared the affidavit for
4 his signature.

5 CHAIRMAN LUNDGREN: Were you present in
6 the previous meeting where he made those statements?

7 MR. WRIGHT: Absolutely I was.

8 CHAIRMAN LUNDGREN: Mr. Wilkinson, is it
9 your testimony that you were present in the meeting
10 that Mr. Wright is referring to and those were your
11 statements in that public meeting?

12 MR. WILKINSON: Sure.

13 CHAIRMAN LUNDGREN: Thank you.

14 MR. WRIGHT: Thank you.

15 CHAIRMAN LUNDGREN: I would suggest a very
16 short recess and then when we come back, I'm going to
17 invite the members of the Board to have at any of you
18 for general questions, if they have any remaining
19 questions. You can go through your notes in
20 questions and put those together. After which, I'm
21 going to suggest that we start entertaining motions
22 to make various findings. And I would like to
23 conduct that tonight and get on with business. So we
24 will take a very short recess and come back.

25 (A break was taken.)

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1 lot subdivision in the entire County into the
2 location that they've proposed. And for the reasons
3 involved and the mistakes that we've listed and gone
4 over, and labored, we would respectfully request,
5 therefore, that this panel conclude that too many
6 mistakes have been made and it needs to be corrected.
7 It needs to be overturned. Thank you.

8 CHAIRMAN LUNDGREN: Do you have any
9 questions for Mr. Hathaway?

10 Thank you, sir.

11 MR. WRIGHT: This is not argument, this is
12 just a clarification, and it needs to be in for the
13 record. If you would allow me to just address the
14 issue of the affidavit, and Mr. Hathaway. His
15 comment was that it was clearly not timely for the
16 governing body to consider. That is incorrect. The
17 affidavit was changed to reflect the Applicant's
18 statements and comments during the meeting that was
19 held the day before. And it was just not able to be
20 prepared until the day after. But it precisely and
21 directly reflects the public comment and the
22 Applicant's comment from the day before. And I just
23 want that clarification. I would proffer that if you
24 want.

25 CHAIRMAN LUNDGREN: Well, let me ask you a

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1 CHAIRMAN LUNDGREN: I think I speak for
2 the members of this Board and I thank each one of you
3 for the time and effort and information which you
4 have shared with us tonight. Personally, I've spent
5 a lot of time going through these materials. And my
6 wife can testify to that fact. And I've disappeared
7 many a evening when she would rather have me sit down
8 and watch a basketball game. I gave up that
9 delightful pleasures for this evening. And from the
10 comments that my fellow members of the Board have
11 made, it's pretty clear to me that they have also
12 done their homework prior to coming in here. The
13 arguments and the information which you have
14 presented have certainly helped my perspective and
15 I'm sure every other member of this Board, gain a
16 deeper understanding of what the facts and what the
17 relevant issues are that we need to talk about
18 tonight.

19 Prior to going forth, I would invite
20 members of the County, if they have questions for
21 anybody, to posit those now.

22 MR. BROWN: Are we going to go through a
23 list of --

24 CHAIRMAN LUNDGREN: I've got a list. And
25 you've got some things you're going to add to it, I

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<p>1 hope, because my list is not comprehensive. 2 MR. BROWN: I guess my first question 3 would be, should we be here? 4 CHAIRMAN LUNDGREN: Probably will be. Or, 5 "How soon can we go home?" 6 Do you have any questions, Mr. Brown. 7 MR. BROWN: No. 8 CHAIRMAN LUNDGREN: Mr. Vancampen? 9 MR. VANCAMPEN: No further questions. 0 CHAIRMAN LUNDGREN: Mr. McClellan? 1 MR. MCCLELLAN: No, sir. 2 CHAIRMAN LUNDGREN: Okay. Then I'm going 3 to let you off the hook. I've got some that I think 4 are fairly well addressed. We will reserve the 5 right, as we go through our motions and we discuss 6 them, we're going to be discussing that in the open 7 in front of you. From time to time, we may want more 8 information, and we may want a clarification of what 9 was said or what was meant to be said. This is not 0 necessarily a time for you to interject. Although, 1 if you have something substantive that, you know, 2 just this horrible thing that you think we're 3 missing, we will entertain that, presented briefly. 4 However, it is my understanding that each of the 5 parties have rested their cases; is that correct, Mr. 237</p>	<p>1 and considered by the Board. 2 MR. BROWN: Do we need a motion? 3 CHAIRMAN LUNDGREN: No, we don't. I'm 4 going to do this very unorthodox. Any other 5 exhibits? Mr. Hammond, do you have any that you need 6 to present? 7 MR. HAMMOND: No. I would object to the 8 Appellant's Exhibit Number 2 coming into evidence. I 9 don't think that that's relevant at all. 10 CHAIRMAN LUNDGREN: Appellant's Exhibit 11 Number 2 in the black folder? 12 MR. HAMMOND: It's a white folder that was 13 presented to us. 14 MR. HATHAWAY: I ran out of black 15 three-ring binders. Sorry. Yours is white. 16 CHAIRMAN LUNDGREN: And the basis of your 17 objection? 18 MR. HAMMOND: That it's irrelevant. It 19 was not considered by the County Council at all. 20 It's outside of their records; therefore, it cannot 21 be part of this body's records. 22 CHAIRMAN LUNDGREN: Well, any comments on 23 that, Mr. Hathaway? 24 MR. HATHAWAY: I offered it for purposes 25 of showing that this was something that was and 239</p>
<p>Hathaway? MR. HATHAWAY: Yes, we rest. CHAIRMAN LUNDGREN: Mr. Wright? MR. WRIGHT: I would move for the submission of some documents that we've referred to. I showed them to Counsel. I've got the two letters on the flooding issue that we've talked about. I've got minutes from the Mr. McMillan, home construction business in his home across the street, and I would ask that those be put in, as well as we've submitted the Development Agreement. I haven't formally suggested that it be part of it, but I ask that that be included, as well. CHAIRMAN LUNDGREN: And that's a timely suggestion because nobody has moved to identify any exhibits or to admit them into the record. In addition to those that Mr. Wright has identified, are there other issues that we need to bring into the record? MR. WRIGHT: Yes. We request that Exhibits 1 through 4 in the binders be received. In addition, we would move that the photos, the plat, and the affidavit -- well, the affidavit actually is also in the binder, so we don't need to do that. But the photos and the plat plot plan also be received 238</p>	<p>1 should be of interest to the County in dealing with 2 it. That's why it was offered and that was what I 3 argued. 4 CHAIRMAN LUNDGREN: We'll accept it for 5 that limited purpose. 6 Mr. Wright, do you have any others? 7 MR. WRIGHT: I was going to join for the 8 record, so that we have it, in objecting to it; in 9 addition to hearsay, and foundation, and relevance. 10 CHAIRMAN LUNDGREN: I would add to the 11 list of exhibits that have been proposed, to admit 12 whatever exhibits have been handed to us tonight that 13 have not been on that list. I don't know if we've 14 got everything on your list or not. We have had a 15 number of stacks of documents delivered to us. A 16 letter dated 11, July of 2005, that's on your list; 17 isn't it? 18 MR. WRIGHT: No. I believe that was -- 19 CHAIRMAN LUNDGREN: Do you wish that to 20 be -- 21 MR. HATHAWAY: Yes, I would offer that, as 22 well. And in addition, I think any of the 23 attachments to any of the briefs, I think by 24 stipulation, we can have those received. 25 CHAIRMAN LUNDGREN: And I would make 240</p>

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1 inclusive in that, the county planner provided to us
2 a number of documents and background documents. This
3 includes a bound unit and a -- I guess it's just that
4 bound unit that we received. All of those would be
5 made part of the record.

6 MR. HATHAWAY: I don't know what those
7 are, but if it's part of the record --

8 CHAIRMAN LUNDGREN: It is. And you have a
9 right to know what they are.

10 MR. HATHAWAY: May I briefly review it?

11 CHAIRMAN LUNDGREN: You may. These are
12 simply copies of minutes and records from the County
13 Planning Commission and the Council. It's a history,
14 simply a history and it's documents submitted by Mr.
15 Wilkinson, primarily by Mr. Wilkinson, actually,
16 along with minutes and so forth which are already in
17 the official record.

18 MR. HATHAWAY: I believe I've seen all of
19 these.

20 CHAIRMAN LUNDGREN: I don't think there's
21 any surprises in there.

22 MR. MULLEN: The only thing that you may
23 not have seen in there are the actual minutes and
24 staff reports that went to the Planning Commission
25 and County Council from County staff.

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1 MR. HATHAWAY: I believe I have received
2 those pursuant to GRAMA.

3 MR. WRIGHT: This includes -- let me just
4 make sure I understand this. It's the Board of
5 Adjustment --

6 CHAIRMAN LUNDGREN: And additional
7 hearings related to Mr. Wilkinson. That's not a
8 comprehensive index on the cover. The majority of
9 that has to do with Mr. Wilkinson's appearance before
10 the Planning Commission and the County Council.

11 MR. WRIGHT: And then, you know, I haven't
12 looked at them.

13 CHAIRMAN LUNDGREN: They're out of the
14 County records.

15 MR. WRIGHT: I would object because I
16 don't know the relevance at all of --

17 CHAIRMAN LUNDGREN: And if I may remind
18 you, those were raised as issues showing a precedence
19 to the 30-day appeal period.

20 MR. WRIGHT: I haven't looked at them.
21 And, again, I object to the relevance and foundation
22 for the record.

23 CHAIRMAN LUNDGREN: Okay. Objection is
24 noted.

25 MR. WRIGHT: And then I would object also,

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1 I don't have a problem with the attachments on Mr.
2 Hathaway's with the exception to the very last one
3 that has to do with MU safety-something.

4 MR. HATHAWAY: We'll withdraw the exhibit.

5 CHAIRMAN LUNDGREN: The Utah Division of
6 Water Rights?

7 MR. HATHAWAY: Yes. It's just from the
8 web site. It contains some of the statistical
9 information that I think Mr. McMillan testified
10 about.

11 CHAIRMAN LUNDGREN: Is this what he was
12 referring to?

13 MR. HATHAWAY: No. No, he knows it
14 independently of this.

15 CHAIRMAN LUNDGREN: Mr. McMillan, the
16 Exhibit F, on your exhibit, is that the website you
17 were referring to regarding your testimony concerning
18 the dam and the statistics you used, or was it a
19 different place?

20 MR. McMILLAN: I referred it so that if
21 you wanted to look it up, you could. But I knew by
22 heart that the dam is 53 feet high, and the
23 hydraulics level is 49 feet et cetera, it's 283 feet
24 wide with a 600 foot crest. I don't need a website.
25 I just referenced so if you wanted to look it up, it

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1 was there.

2 CHAIRMAN LUNDGREN: Okay. Chair would
3 entertain a motion to admit the exhibits that have
4 been identified and I'm going to go through and
5 detail those so there's no question for the record
6 what they are.

7 With the exception of Exhibit F of Mr.
8 McMillan's brief, which will be omitted by
9 stipulation, we will move to admit all of his
10 exhibits; the exhibits attached to the other briefs;
11 the letter from Kelly Wright, dated 11, July of 2005
12 to Mr. Hathaway; a book of exhibits provided by
13 Sherrie Christensen's office, which primarily are
14 contained; and Mr. Wilkinson's agendas,
15 presentations, plans, and suggestions before the
16 County Council with minutes and records; a two-page
17 document, at the bottom dated 6/8/95; a letter from
18 the Department of Transportation dated August 22,
19 2005 to Mr. McMillan from Rex Harris; and a letter
20 dated June 21, 2005, to UDOT from Mr. McMillan, as
21 exhibits.

22 MR. HATHAWAY: Mr. Chair, I would object
23 to the last three exhibits on the basis of relevance.
24 The two letters had to do with the aquifer that goes
25 -- the two letters have to do with the aquifer that

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1 goes under I-84, and the minutes had to do with the
2 conditional use granted Mr. McMillan for his
3 property.

4 CHAIRMAN LUNDGREN: Your objection is
5 noted, Mr. Hathaway. But since these items were
6 discussed in testimony and these were referred to, I
7 think they would be helpful.

8 Any other comments?

9 MR. MULLEN: Yes, a comment about deleting
0 that last submission here. I think there's some
1 relevant information in that Utah Division of Water
2 Rights that Mr. Hathaway suggested here. And two of
3 those items are under Basic Information. On the
4 first page it says Hazard Rating for the dam and it
5 says "high." And I think that's important that that
6 be noted. And also on the next page, it says,
7 "Emergency information, first downstream town, homes
8 below dam, distance, 1/10 of a mile." And I think
9 that's just information that needs to be kept in the
0 record.

CHAIRMAN LUNDGREN: Mr. Wright, would you
like to respond, as it was your request to admit that
exhibit?

MR. WRIGHT: Again, based upon the
testimony, I don't think it has any -- I mean, we

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1 this would carry by stipulation. Mr. Wright and I
2 were discussing this during the break. I went back
3 and was looking at the Appellate Rules, and the
4 Appellate Rules, the only guidance really that's
5 given in regard to deliberations is that the decision
6 of this panel is not final until a written decision
7 issues. It doesn't say that it has to all happen
8 immediately. And in light of the hour, we certainly
9 would not have any objection and, in fact, would
10 stipulate to recess, allow the panel to meet at its
11 convenience, as soon as it's possible, and then upon
12 that basis of that meeting enter in findings of fact,
13 and stipulation -- or I'm sorry, an order and provide
14 it to all of the parties as soon as they're
15 reasonably able to do that. I would hate to see
16 everyone impanelled and all of us having to stay here
17 all evening, if that's what it takes. But it is late
18 and we've spent a lot of time this evening. And
19 maybe fresher minds might prevail in some of it.
20 Anyway, that's what my suggestion would be.

21 CHAIRMAN LUNDGREN: Mr. Wright? Mr.
22 Hammond?

23 MR. HAMMOND: Yes. Coventry Cove and
24 Wilkinson would object to that. We believe that we
25 should finish this out tonight.

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talked about it as to what it is. The issue goes to
this development and how it impacts it, not the dam.
I mean, the dam is there. It's there regardless of
what happens with the development.

CHAIRMAN LUNDGREN: Okay. I need a motion
from the Board.

MR. McCLELLAN: I so move.

CHAIRMAN LUNDGREN: Well, you've got to
clarify. We have a discussion here. Will Exhibit F
be included or excluded?

MR. McCLELLAN: I move that we keep it in.

CHAIRMAN LUNDGREN: Along with the other
documents identified?

MR. McCLELLAN: Yes.

MR. MULLEN: I will second it.

CHAIRMAN LUNDGREN: Do you have a
discussion on the motion? I call for a vote. All in
favor say "aye"?

BOARD: Aye.

CHAIRMAN LUNDGREN: Any opposed?

The vote is unanimous.

MR. HATHAWAY: Mr. Chairman, may I make a
suggestion?

CHAIRMAN LUNDGREN: You may.

MR. HATHAWAY: And I don't know whether

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1 CHAIRMAN LUNDGREN: Mr. Wright?

2 MR. WRIGHT: I will join in support with
3 Mr. Wilkinson.

4 CHAIRMAN LUNDGREN: Members of the Board?

5 MR. BROWN: They're not trying to get on
6 our good side, are they?

7 CHAIRMAN LUNDGREN: Any discussion on the
8 suggestion by Mr. Hathaway?

9 MR. BROWN: How many items do we have to
10 go over?

11 CHAIRMAN LUNDGREN: I think we're going to
12 be here for another hour to hour and a half.

13 MR. VANCAMPEN: So what that really means,
14 based on our assumption that the meeting would take
15 an hour and it took about three, we'll be here until
16 it's time to go to work in the morning.

17 CHAIRMAN LUNDGREN: Well, you may be
18 right, I just don't know. I have a list of issues
19 that I think we need to make findings on that covers
20 three pages, and I just don't see any way to go
21 through those very quickly. Some of them are fairly
22 short. I believe some of them will have a
23 discussion.

24 MR. MULLEN: May I make a suggestion that
25 we go and proceed on, and if we get to a point where

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1 we're too tired to continue, where it becomes
2 nonproductive for all parties, then we may be able to
3 do the written findings after the fact to make that
4 happen within the next day or two, or as soon as we
5 quickly can, if we need to do that, so we don't lock
6 ourselves into something, so we can have flexibility
7 if we can do that.
8 MR. VANCAMPEN: Can I make a different
9 suggestion; slightly different? I think if we
10 address Mr. Wright's motion to dismiss, that may or
11 may not be dispositive, and then we can go to that
12 point. And if it's not dispositive, then we can get
13 into the hearing or go home, whichever is --
14 CHAIRMAN LUNDGREN: Are we agreed on that
15 point?
16 (Discussion among the Board.)
17 MR. HATHAWAY: May we be excused for just
18 a moment?
19 CHAIRMAN LUNDGREN: At the risk of us
20 going ahead without you.
21 MR. HATHAWAY: Please, do.
22 CHAIRMAN LUNDGREN: We'll do this the hard
23 way. With the approbation of this body, let me just
24 suggest some topics that we need to discuss in
25 regards to the issues of jurisdiction.

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1 Mr. Wright's first motion concerned
2 subject matter jurisdiction; whether or not Mr.
3 McMillan filed a timely time to appeal. Their
4 objections taken over Utah Code Section 17-27(a)87,
5 Section 704, particularly the meaning of the second
6 sub-paragraph, "In the absence of such an ordinance
7 and at a minimum an adversely affected party shall
8 have ten calendar days to appeal."
9 The question before the Board is whether
10 or not, I suppose, we are limited -- Mr. McMillan was
11 limited to ten calendar days to appeal or if he had
12 at least ten calendar days to appeal, if not more,
13 and whether or not his appeal was timely filed. I
14 open that subject for discussion, if there's any
15 discussion on it.
16 MR. BROWN: If we don't believe it was,
17 why did we listen to this whole thing tonight? I
18 mean, that's really what we should have done right
19 off the bat, and then we could have dismissed and
20 went home.
21 CHAIRMAN LUNDGREN: Mr. Wright was correct
22 when he stated that a juris -- it's getting late. A
23 jurisdictional question can be raised at any time.
24 And regardless of whether it had been discussed prior
25 or not, he is entitled to have a ruling on that

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1 tonight.

2 MR. VANCAMPEN: Now, that we've brought it
3 up, I do have another question for Mr. Wright, and I
4 hope I don't offend anybody.

5 You referred to retroactive application
6 possibilities. You said you didn't feel they
7 applied. What are the retroactive application
8 possibilities?

9 MR. WRIGHT: What are they? If you have
10 express language in there that says this applies
11 going back; if you have other indications that this
12 was intended to apply back or if it's procedural. If
13 it's procedural, the inference is this whole process
14 here that took place, I think the new ordinance that
15 came about was -- it included, "Here's how we're
16 going to conduct this hearing." That's procedural,
17 not substantive. So an argument could be made that
18 procedural issues, if you go back, but the better
19 argument is, there was nothing in the ordinance that
20 suggests that that's the case. There's nothing
21 expressed, there's nothing that was intended.

22 MR. VANCAMPEN: You're talking about this
23 currently adopted ordinance?

24 MR. WRIGHT: Yes.

25 MR. VANCAMPEN: That's all I had.

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1 CHAIRMAN LUNDGREN: The Board will
2 entertain, the Chair will entertain a motion of
3 whether or not Mr. McMillan timely filed his
4 application for the appeal.

5 MR. VANCAMPEN: I move that we find that
6 he did not file a timely application.

7 CHAIRMAN LUNDGREN: Do we have a second
8 for that motion?

9 MR. McCLELLAN: I'll second that.

10 CHAIRMAN LUNDGREN: Discussion on the
11 motion?

12 MR. VANCAMPEN: The reason I make this
13 motion is that he told us that he had retained an
14 attorney prior to the final resolution of this
15 matter. He had opportunities at various public
16 comment meetings and other hearings to have addressed
17 these matters. His attorney told us that they did
18 not call and confirm whether it was a 10 or 30-day
19 rule. And the statute in place at the time clearly
20 states that it was a 10-day rule until it was
21 modified by the Morgan County Code, which expanded it
22 to 30 days in August of the same year.

23 CHAIRMAN LUNDGREN: Other comments?

24 MR. BROWN: I think precedence does
25 matter. I think the County couldn't run on that

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1 assumption of whether it's in the book or not. I
2 think we disagree with Terry Wright. I think if you
3 go back through history, there is a 30-day rule,
4 whether it was wrote down or not. I think ten days
5 is unreasonable.

6 MR. MULLEN: I would also disagree with
7 that because I think the language in Number 2 of that
8 ordinance is "at a minimum," which I take to be at
9 least. In understanding counsel and others here, I
0 believe that the intent was to allow the counties
1 time to do what's necessary and whatever was
2 reasonable. And I think 30 days is reasonable, and I
3 think it's also a precedent that's been set by the
4 County.

5 CHAIRMAN LUNDGREN: And I'll concur with
6 Mr. Mullen's point. I believe the language "at a
7 minimum" does not refer to the prior paragraph. I
8 think that in the absence of an ordinance, and at a
9 minimum, a party has ten calendar days to appeal. I
0 think it's open ended.

Any other discussion?

MR. McCLELLAN: I agree with Mr. Wright.
I like his interpretation.

MR. VANCAMPEN: I concur with that. I
think it clearly states that we don't have a statute;

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therefore, it's ten days until such time that we
create our own statute. And at which time, we can
make it ten or 15 or 30, but not less than ten.

CHAIRMAN LUNDGREN: Any other comments? I
call for a vote? All in favor of the motion, say,
"Aye."

(Aye vote was taken.)

CHAIRMAN LUNDGREN: Opposed?

(Nay vote was taken.)

CHAIRMAN LUNDGREN: That motion did not
pass, so the Chair will entertain another motion.

MR. BROWN: I will make a motion, because
the precedent has been set in language in Paragraph
2, that we are legal in hearing this, and it is
within our jurisdiction to rule on this matter
tonight.

CHAIRMAN LUNDGREN: Do I have a second?

MR. MULLEN: I will second that, but I
have a question. Did not the fact that the other
motion was defeated indicate that, by de facto, that
this motion is unnecessary?

CHAIRMAN LUNDGREN: Well, I think I would
like to have it clear on the record.

MR. MULLEN: Okay. That's fine. I will
second it.

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1 CHAIRMAN LUNDGREN: All in favor say,
2 "aye."

3 (Aye vote was taken.)

4 CHAIRMAN LUNDGREN: All opposed?

5 (Nay vote was taken.)

6 CHAIRMAN LUNDGREN: The pass is three to
7 two.

8 And now I've got a question. On bylaws,
9 do we need to pass that with more than a three to two
10 majority?

11 MR. WRIGHT: If you'll look at the
12 language code. It says a majority.

13 CHAIRMAN LUNDGREN: And I'll rely on your
14 representation. The next issue I believe raised in
15 this regard is whether or not the timely payment of
16 the application fee defeats the right to appeal. We
17 heard, as I recall, allegations that the application
18 fee had not been paid with the application. Was the
19 application fee ever paid, Sherrie?

20 MS. CHRISTENSEN: Yes, it was. As soon as
21 he was notified, a check was sent.

22 CHAIRMAN LUNDGREN: Okay. And again, we
23 need a motion on the subject of whether or not the
24 timely payment of the application fee defeats the
25 right to appeal. The fact that it was late, does

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1 that deprive the Applicant of his right to appear
2 tonight?

3 MR. McCLELLAN: May I ask a question
4 before the motion?

5 CHAIRMAN LUNDGREN: You may.

6 MR. McCLELLAN: Is there a staff policy on
7 payment?

8 MS. CHRISTENSEN: Generally we take the
9 payment in with the application at the time of the
10 application. Where the application was actually
11 forwarded to the county attorney's office, rather
12 than our office, after the fact, that was when we
13 realized, and I pointed out to our county attorney
14 that there is a fee required. He immediately sent a
15 letter and then we received payment.

16 MR. McCLELLAN: So it was the difference
17 between the receiving of the letter and the receiving
18 of the payment?

19 MS. CHRISTENSEN: Right. Kelly sent the
20 letter on July 15th, and we received a payment on
21 July 20th.

22 MR. McCLELLAN: Okay. Thank you.

23 MS. CHRISTENSEN: I apologize. Kelly's
24 letter was dated July 11th, and his letter -- Mr.
25 Hathaway's letter back was dated July 15th, mailed to

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1 us with a payment. It was receipted in the office of
2 the County Treasurer on July 20th.

3 CHAIRMAN LUNDGREN: Okay. Do I have a
4 motion?

5 MR. MULLEN: I will make the motion that
6 the payment was not necessary for the appeal to
7 continue; that the payment was received under the
8 circumstances because it was sent to different
9 locations; and that you not deny the Applicant the
10 right to appeal.

11 CHAIRMAN LUNDGREN: Is there a second on
12 the motion?

13 MR. BROWN: I'll second it.

14 CHAIRMAN LUNDGREN: Any discussion on the
15 motion?

16 All in favor?

17 BOARD: Aye.

18 CHAIRMAN LUNDGREN: Any opposed?

19 The second issue, which I believe we need
20 to discuss tonight, and as it pertains to
21 jurisdiction, is whether or not this Board has the
22 jurisdiction over how the overlay zone was applied.
23 I believe the comments went that the application zone
24 is a legislative function and its use is a
25 legislative function; or whether the creation of the

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1 MR. McCLELLAN: No.

2 CHAIRMAN LUNDGREN: The Chair would
3 entertain a motion as to whether or not application
4 of the overlay zone was legislative or not.

5 MR. VANCAMPEN: So moved.

6 CHAIRMAN LUNDGREN: Do I have a second?

7 MR. McCLELLAN: I'll second it.

8 CHAIRMAN LUNDGREN: All in favor?

9 BOARD: Aye.

10 CHAIRMAN LUNDGREN: The next question is
11 whether or not Mr. McMillan has standing to bring his
12 complaint before this Board. As you recall, the
13 discussion around standing centered around,
14 primarily, whether or not Mr. McMillan fits the
15 requirements to be adversely affected by the
16 decisions made by the County Council. If a motion is
17 made, we should have some detail as to what type of
18 aspects Mr. McMillan has standing, if you believe
19 that's relevant.

20 MR. McCLELLAN: I don't know what
21 "standing" is.

22 CHAIRMAN LUNDGREN: Let me rephrase what I
23 said. This is an obtuse concept. It's even tough
24 for law students. A person has a right to bring an
25 action against, in this case, a complaint against

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1 overlay zone is a legislative function, then we have
2 jurisdiction to view how it is applied. Any
3 comments?

4 MR. VANCAMPEN: Well, I thought that was
5 kind of an awkward argument to make because the law
6 exists and it was applied through this process. And
7 so it's not legislative. It's more just an
8 application of existing laws. So I don't propose
9 that we spend too much time on this because I don't
10 think it really makes a lot of sense.

11 CHAIRMAN LUNDGREN: Let's call for a
12 motion.

13 Do you have a comment, John?

14 MR. MULLEN: Also, according to the
15 minutes that we have of the meetings, it indicates
16 that the land was actually rezoned I believe on July
17 15, 2004 to the R-120 designation and R-1 already
18 existed. So the actual rezoning, which appears to be
19 of a legislative nature, in that aspect, was done
20 July 15, 2004. The application of the PUD overlay
21 zone was done when this was completed. And I also
22 agree with Chris, that I think that's an
23 administrative functions application as opposed to
24 legislative. Administrative decision. Sorry.

25 CHAIRMAN LUNDGREN: Comment, Don?

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1 what the County Council has done in a way of a
2 decision if they are adversely affected. It can't be
3 just a casual sort of a thing; it has to be a
4 decision that actually impacts that person. There
5 has to be some substance to it of some sort. And it
6 should be something that is somewhat articulatable.
7 Mr. McMillan alleged that he was affected because of
8 the additional risk as to a flood, his tax burden --
9 and I knew I was going to miss that third one.

10 MR. HATHAWAY: Proximity.

11 CHAIRMAN LUNDGREN: Oh, the proximity to a
12 very high development, and because he's within view
13 of that development. And he claims those are adverse
14 effects on him, which gives him the right to bring a
15 complaint.

16 MR. McCLELLAN: So the motion has nothing
17 to do with those three things, it's just whether he
18 has the right to bring them forward.

19 CHAIRMAN LUNDGREN: Both. Okay? Whether
20 or not -- if he has standing, it's appropriate for us
21 to make a finding of how he's adversely affected. We
22 can't -- I don't think it would help -- if this case
23 was up to the district court, it's not going to help
24 them to understand what we did if we can't articulate
25 how Mr. McMillan was adversely affected, and they're

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1 going to want to know that.
2 MR. VANCAMPEN: My first impression
3 regarding standing or how he's adversely affected
4 with regards to water or flooding is, a flood is a
5 flood, whether or not the development is there. The
6 development does not cause the flood, assuming that
7 it happens. So I don't know if we've heard any
8 argument that the development would accentuate or
9 exacerbate or make worse the conditions. So I don't
0 know if that goes to "adversely affected." And I
1 would be interested in hearing what you members think
2 about that particular aspect, because that's one of
3 the three.

4 CHAIRMAN LUNDGREN: All right. Let's
5 start with the flooding issue. Comments on that?

6 MR. McCLELLAN: I appreciated the comments
7 of the county engineer and what Chris said. The
8 floods will come whether the development is there.
9 So I don't think that would be an adverse situation.

0 MR. MULLEN: I'm going to make a comment
1 that kind of goes around it and gets into the issue
2 of our goal here. And that is that I believe, as we
3 discussed earlier, that this does exist in a
4 sensitive area because of the definitions in Chapter
5 28 of what a sensitive area is. And I don't think

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1 mentioned was taxes. He testified that, based upon
2 the analysis provided by Mr. Wilkinson, that it was
3 likely, according to the school board letter, that
4 his taxes would go up as a result of the Coventry
5 Cove Development.

6 MR. VANCAMPEN: So the question becomes,
7 does any person that lives inside the County have
8 standing, then, to go file an appeal of any
9 development that's approved anywhere in the County
10 because it's going to raise his taxes?

11 CHAIRMAN LUNDGREN: If it's shown that it
12 raises his taxes.

13 MR. VANCAMPEN: Okay.

14 CHAIRMAN LUNDGREN: That is probably a
15 correct interpretation.

16 MR. VANCAMPEN: Well, then, I think that
17 he meets his requirement on that argument.

18 CHAIRMAN LUNDGREN: Okay.

19 MR. McCLELLAN: So would everybody else,
20 though.

21 MR. BROWN: Well, they can bring an
22 appeal.

23 MR. McCLELLAN: I personally know of eight
24 subdivisions that are ongoing inside the city limits
25 of Morgan City. I don't think this one is going to

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that was taken into consideration by the land use
authorities that were reviewing this, because it was
never brought up in any of the notes that I have of
the minutes of meetings and so forth and so on.

And I think as far as adversely affecting
Mr. McMillan is concerned, although it's going to
flood whether the property is there or not, I think
that adversely affects all of us as citizens if the
land use authority doesn't take into consideration
those kinds of things when it makes these decisions.
Therefore, even though it may not be a direct impact
on him, it does impact all of us, including Mr.
McMillan.

CHAIRMAN LUNDGREN: Let's save that for
item number four. I think that's a timely
observation.

MR. MULLEN: All right.

CHAIRMAN LUNDGREN: Any other comments on
the flooding issue? If not, I would add one. I
believe Mr. McMillan testified that it was not his
opinion that the Coventry Cove Development, in and of
itself, would create a flooding issue that would
affect his property. So I think we're all in
concurrence on that issue.

All right. The second item Mr. McMillan

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1 matter that much. I don't think that's an issue. I
2 think it's a nonissue.

3 MR. BROWN: Well, within the rules,
4 though, he does have a legitimate standing there
5 that, you know, taxes will go up. You know, whether
6 it's frivolous or not, I guess, that's up to us to
7 determine. But I think the standing is there.

8 CHAIRMAN LUNDGREN: I think it's my
9 understanding that if an individual is subject to
10 increased taxes by an action by a municipality, they
11 have a right to complain and contest that action
12 because it affects their pocketbook. I think there's
13 some Supreme Court cases to that effect; although, I
14 cannot cite them off the top of my head.

15 MR. VANCAMPEN: All right. Little "can of
16 worms" time. Is this a timely and proper place to
17 raise that issue, particularly, since there have been
18 many open comment periods where he could have raised
19 that previously?

20 CHAIRMAN LUNDGREN: I think that goes to
21 the scope of what we are going to consider tonight,
22 which is another issue.

23 MR. VANCAMPEN: That was a slippery
24 answer.

25 CHAIRMAN LUNDGREN: You opened a can of

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1 worms.

2 MR. VANCAMPEN: Well, I guess I answered
3 my own question with thinking about it, that he
4 probably raised that and it was evaluated and
5 commented on and decided by the Council, and then he
6 appealed their decision because it was adverse to
7 him.

8 CHAIRMAN LUNDGREN: Correct.

9 MR. VANCAMPEN: See -- okay.

10 CHAIRMAN LUNDGREN: The third issue that
11 was raised is whether or not standing is possible
12 because Mr. McMillan's property sits in proximity to
13 the Coventry Cove and he can view that, and he finds
14 that view offensive. Does that provide him standing?

15 MR. McCLELLAN: I would say that if the
16 Gardner Development was not happening, that might be
17 the case. But where that's coming in, there's going
18 to be homes right across the street anyway. I don't
19 think that's an issue.

20 MR. VANCAMPEN: I don't know if that was
21 necessarily his argument so much as the hyper density
22 of the project and the low prices of the houses might
23 affect his property value, and things along those
24 lines was more the argument that they were making.

25 CHAIRMAN LUNDGREN: And I may not have it
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1 clear, but I think what he's saying is because of the
2 hyper density, it is that factor that is upsetting to
3 him. That's what he's feeling.

4 MR. VANCAMPEN: Right. So we don't
5 disagree, then.

6 CHAIRMAN LUNDGREN: Just making sure we're
7 on the same page. All right. The fourth one you
8 raised, Don, do you want to articulate that again?

9 MR. MULLEN: I'm concerned that the
10 sensitive areas, again, was not addressed by either
11 the County Council or the Planning Commission
12 regarding this particular property because it is in a
13 flood area. And there's no disputing that, that all
14 parties have agreed that it is an area where that
15 occurs; maybe not compared to a flood plain or
16 specifically as the engineer is concerned, but we've
17 seen results of what occurs, what has occurred in '84
18 and twice since that, as I understand it in some
19 capacity. And I believe that the definition of the
20 sensitive area here in the text is such that it
21 should have been addressed. And I believe that
22 because it wasn't addressed, that Mr. McMillan, along
23 with other people in the County, all of the County
24 members are affected by the fact that the Planning
25 Commission and County Council didn't consider that
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1 issue before they went through with this.

2 CHAIRMAN LUNDGREN: Additional comments?

3 MR. McCLELLAN: Could I ask a question of
4 Mr. Wright?

5 CHAIRMAN LUNDGREN: Yes.

6 MR. McCLELLAN: Does an area have to be
7 declared a sensitive area to be a sensitive area, or
8 just has to meet that definition?

9 MR. WRIGHT: I'm sorry. Does it --

10 MR. McCLELLAN: Does it have to be
11 declared a sensitive area, or does it just have to
12 meet that definition?

13 MR. WRIGHT: I would have to take a look,
14 if I could get back to you, and take a look at the
15 issue. I don't know that without looking.

16 MR. MULLEN: May I make a suggestion on
17 that? In Section 16-28-040 in the Code, it states,
18 "The Sensitive Area District, SA zoning district if
19 not marked on the zoning map per se, shall
20 nonetheless include areas of Morgan County designated
21 as 100-year flood plains, geological hazards
22 including earthquake areas, unstable soil conditions,
23 slopes in excess of 15 percent, and areas subject to
24 flooding," as well as, "High water table and ground,
25 and a few others. So it says that, in general,
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1 basically if it's not in the zoning district, it
2 should be considered a sensitive area if it is an
3 area that's subject to flooding.

4 MR. WRIGHT: To the extent that the zoning
5 district hasn't been zoned to such, it would be my
6 argument, and based upon the evidence that I've heard
7 from the engineer, that this is not a sensitive area
8 district, and it was not declared such. So you might
9 want to get argument from Counsel, as well.

10 CHAIRMAN LUNDGREN: Do you want to comment
11 on that, Mr. Hathaway?

12 MR. HATHAWAY: I thought all parties had
13 rested, and I'm not sure whether Mr. Wright is now
14 taking the role of advising the panel, but --

15 CHAIRMAN LUNDGREN: Well, we're
16 entertaining questions on issues. Mr. Wright has
17 commented on his belief as to how the sensitive area
18 applies as rule to make standing. Do you have a
19 comment on that issue?

20 MR. HATHAWAY: I would defer to the text
21 that Mr. Vice-Chair read because that's the
22 ordinance. And whether I agree, or believe, or
23 concur, to me doesn't make any difference. That's
24 what the ordinance says. And it says that
25 essentially it's deemed sensitive area if it
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1 otherwise meets the qualifications.
2 CHAIRMAN LUNDGREN: I would direct the
3 Board's attention to the Mountain Green Area Plan,
4 Chapter 9.
5 MR. VANCAMPEN: Is this the one that it
6 says it is --
7 CHAIRMAN LUNDGREN: Well, it talks about
8 the sensitive -- "Development in the areas of
9 significant known natural hazards shall be
10 prohibited, and development in the areas of high
11 potential for natural hazards shall be strongly
12 discouraged or mitigated." 9.2. It's on the --
13 well, we don't have a page. On the left-hand, next
14 page over from where you're at. Okay. I don't know
15 if that provides any guidance or not.
16 MR. VANCAMPEN: Well, yeah, because this
17 is not a natural hazard; right? It's a dam
18 situation.
19 MR. BROWN: It says any lake or large
20 pond.
21 CHAIRMAN LUNDGREN: Yeah. Okay. Any
22 comment on the sensitive area designation? If not,
23 we're moving on.
24 MR. McClellan: Well, obviously they'll
25 let you build in sensitive areas because 9.23 says,

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1 comments? If not, the Chair will entertain a motion
2 with some details regarding whether or not Mr.
3 McMillan has standing.
4 MR. McCLELLAN: I think we ought to take
5 them one at a time because some of them I agree with
6 and some of them I don't.
7 CHAIRMAN LUNDGREN: If Mr. McMillan has
8 standing on any one issue, then he has standing.
9 MR. McCLELLAN: Okay.
10 CHAIRMAN LUNDGREN: So we can entertain a
11 motion that has one issue or more.
12 MR. VANCAMPEN: Should we just entertain
13 it as piecemeal, since that's the way we've discussed
14 it?
15 CHAIRMAN LUNDGREN: Let's do it that way.
16 The Board will entertain a motion of whether Mr.
17 McMillan is adversely affected because of the flood
18 issue. Do we have a motion to that effect?
19 MR. McCLELLAN: I make a motion that he
20 was not adversely affected by the flood issue.
21 CHAIRMAN LUNDGREN: Do we have a second?
22 MR. VANCAMPEN: I second that comment.
23 CHAIRMAN LUNDGREN: I call for a vote.
24 All in favor?
25 (Aye vote was taken.)

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"Development in sensitive areas shall leave as much
of the site as possible undisturbed and full of
natural habitation. Disturbed areas shall be
promptly replanted." So obviously they'll let you do
something there.
CHAIRMAN LUNDGREN: Yes. I believe that's
correct. The question is whether or not that gives
him cause; the fact that this may or may not have
been properly addressed by the County Council, does
that give Mr. McMillan cause to raise this appeal?
That's the question.
MR. VANCAMPEN: I think we're putting
words in his mouth because I don't remember hearing
them arguing that as part of their --
CHAIRMAN LUNDGREN: I don't think he did
argue that, but I believe that's John's own issue
that he's raising --
MR. VANCAMPEN: Well, is this the proper
place to address it, then?
CHAIRMAN LUNDGREN: I don't know.
MR. VANCAMPEN: Because I don't think it
was argued as part of their appeal. And so then we
can't award them standing on something they haven't
argued for.
CHAIRMAN LUNDGREN: Okay. Any other

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1 CHAIRMAN LUNDGREN: Opposed?
2 (Nay vote was taken.)
3 CHAIRMAN LUNDGREN: The motion carries
4 that he was not adversely affected because of the
5 flood issue by a vote of 3 to 2.
6 The second issue is the tax issue.
7 MR. MULLEN: I'll make the motion that we
8 consider him to be adversely affected, as it were,
9 because of the tax issue.
10 CHAIRMAN LUNDGREN: Do we have a second?
11 MR. VANCAMPEN: Sure, I'll second that.
12 CHAIRMAN LUNDGREN: We have a motion and a
13 second. Any discussion on the motion? Call for a
14 vote. All in favor of the motion as articulated say
15 "aye."
16 (Aye vote was taken.)
17 CHAIRMAN LUNDGREN: Opposed?
18 (Nay vote was taken.)
19 CHAIRMAN LUNDGREN: The Board rules that
20 based upon the tax issue, that Mr. McMillan has
21 standing. 3-2 vote in favor of that issue.
22 The third issue goes to the view. The
23 Board will entertain a vote of whether or not the
24 view issue gives Mr. McMillan standing to raise the
25 appeal.

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<p>SHEET 35</p> <p>1 MR. BROWN: What do you mean "the view"? 2 Meaning -- 3 MR. VANCAMPEN: Proximity to the -- 4 MR. BROWN: I'll make that motion. 5 CHAIRMAN LUNDGREN: -- high-density area. 6 MR. BROWN: That would devalue his 7 property. I would like that motion. 8 CHAIRMAN LUNDGREN: Do we have a second? 9 MR. MULLEN: I would second that. 10 CHAIRMAN LUNDGREN: We have a second. 11 Discussion on the motion? 12 MR. MULLEN: I don't know if it's 13 necessarily a view, but it's the proximity to the 14 whole operation. 15 MR. BROWN: That's why I certified what 16 you said. I'd scratch "the view." 17 MR. MULLEN: He's got a farming operation 18 across the street within 300 feet of this 19 development, and I think he may feel it affects his 20 ability to conduct a farming operation. I don't 21 know. I'm saying if there's -- the impact was there 22 from the proximity. I think that's an issue. 23 CHAIRMAN LUNDGREN: Any other discussion 24 on the motion and second? All in favor say "aye." 25 (Aye vote was taken.)</p> <p style="text-align: right;">273</p>	<p>1 MR. McCLELLAN: "All opposed," you mean? 2 CHAIRMAN LUNDGREN: All opposed. It's 3 getting late. It's a 2 to 2. The Chair is going to 4 abstain, so that will not pass. 5 The next issue raised by the County was 6 whether or not Mr. McMillan stated a claim upon which 7 relief could be granted. We heard a summary of 8 issues raised by the County of the reasons why they 9 thought there was no substance to it. We heard a 10 list of reasons by Mr. McMillan why he thought he had 11 an issue which this County could decide and resolve 12 the complaints. 13 I'm going to suggest that the view we take 14 on this, and it's certainly not absolute, I would 15 appreciate your input, but I believe the question on 16 whether or not Mr. McMillan has stated a claim upon 17 which relief can be granted is resolved in asking the 18 question whether or not this Board has the ability to 19 issue a decision which resolves some or all of his 20 complaints. So if we can address his complaints and 21 resolve them legally, then I believe he stated a 22 claim upon which relief can be granted. And those 23 issues include whether or not the shop is properly 24 grandfathered, the density issues, and so forth that 25 were raised. Other discussion?</p> <p style="text-align: right;">275</p>
<p>1 CHAIRMAN LUNDGREN: Opposed? 2 (Nay vote was taken.) 3 CHAIRMAN LUNDGREN: 4 to 1. 4 The fourth one was raised by Mr. Mullen su 5 responce. That means on his own. Do we have a 6 motion of whether or not Mr. McMillan can have 7 standing even though this is an issue he did not 8 argue as to the general effect of the sensitive area? 9 MR. MULLEN: I'll make a motion for that. 10 CHAIRMAN LUNDGREN: We have a motion. Do 11 we have a second? 12 MR. BROWN: I'll second it. 13 CHAIRMAN LUNDGREN: I have a second. 14 Discussion on the motion? 15 MR. BROWN: Yeah. It's really surprising 16 to me that the Planning Commission would have put a 17 hyper-density area on a 25-year flood plain, let 18 alone a 50 or 100. 19 CHAIRMAN LUNDGREN: Okay. Any other 20 discussion? 21 MR. VANCAMPEN: I'll just reiterate that I 22 don't think it's properly addressed here; that it's 23 not a standing issue. 24 CHAIRMAN LUNDGREN: Okay. All in favor 25 say, "aye." Two ayes. All in favor, say no.</p> <p style="text-align: right;">274</p>	<p>1 MR. McCLELLAN: The intent of this Board 2 is to resolve issues? 3 CHAIRMAN LUNDGREN: Mr. McMillan is 4 alleging that the County failed to act properly in 5 relation to their ordinance, and we are to make a 6 resolution of whether or not the County acted 7 properly or not. 8 MR. McCLELLAN: Whether they erred. Okay. 9 MR. BROWN: It's easy for me. 10 CHAIRMAN LUNDGREN: Do you have a motion? 11 MR. BROWN: I'll make that motion that we 12 can make that determination or at least present 13 evidence to that point. Whether the Board votes that 14 way or not, I don't know. 15 CHAIRMAN LUNDGREN: Let me make a 16 suggestion. A motion would be properly framed that 17 the Board of Appeals -- excuse me. Mr. McMillan has 18 stated a claim that the Board of Appeals can resolve 19 and, therefore, he stated a claim. 20 MR. BROWN: Yes. 21 CHAIRMAN LUNDGREN: That was very clumsy, 22 but we got the message out. Do we have a second? 23 MR. McCLELLAN: I second that. 24 CHAIRMAN LUNDGREN: All in favor? 25 (Aye vote taken.)</p> <p style="text-align: right;">276</p>

1 CHAIRMAN LUNDGREN: Opposed?
 2 (May vote taken.)
 3 CHAIRMAN LUNDGREN: That motion carries
 4 5-0.
 5 I'm going to ask a question of the Board,
 6 whether or not we want to make finding of fact based
 7 upon items that were raised in the briefings but were
 8 not argued here. I would think it would be
 9 appropriate.
 0 MR. MULLEN: I think it would.
 1 CHAIRMAN LUNDGREN: Okay. One of the
 2 issues raised in the briefs was whether any prior
 3 approval by the County Council allows appeal of the
 4 application of the overlay zone, or whether or not
 5 that right may have been vested in prior approval.
 6 Let me explain to you what I'm trying to say here. I
 7 believe this was raised by Mr. Wilkinson, that in
 8 previous County Council meetings, he had been granted
 9 zoning changes and various preliminary approvals and
 0 so forth, leading up to, finally, the last meeting of
 1 May --
 2 MR. MULLEN: 17th.
 3 CHAIRMAN LUNDGREN: Thank you. Or whether
 4 we can only consider the decision of May 17th. Now,
 5 the interpretations of that is, is he vested in

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1 Development Agreement happened prior to that. So
 2 what this Council is saying is the only thing we can
 3 review is May 17, and that we would not be able to go
 4 back and say, "We think that overall the development
 5 probably has merits, but this and this probably were
 6 not done correctly at some point."
 7 MR. BROWN: If that was the case --
 8 CHAIRMAN LUNDGREN: And let me follow up
 9 with what Chris said, if you'll indulge me. By point
 10 of comparison, I view this process much the same as a
 11 person going through the trial process. And during
 12 the trial process, there's always a whole number of
 13 what they call "interlocutory orders." That is,
 14 orders that are issued partway through the process of
 15 a lawsuit. But any time during the process of the
 16 lawsuit up to the final judgment of the court, any of
 17 those orders can be revisited. I think that the
 18 County Council has inherent, in their powers, that
 19 regardless of earlier decisions that they may have
 20 made, until the final plat approval and everything
 21 that went along with it on May 17 is given, the
 22 County still has the power to go back and amend
 23 anything it may have done. But when they take that
 24 final vote, that is the final judgment. And I think
 25 we have the right, both under that final judgment and

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earlier decisions made by the County or does
 everything come together as a lump sum on May 17th
 that we can review for correctness?
 MR. VANCAMPEN: I would say that that
 interpretation severely limits what we can do.
 Because I would say that the only thing, then, that
 we could remand, since that's the word that we've
 been using tonight, would be a yes/no vote,
 basically, like at that last hearing; right? So if
 we remand and say, "Well, you can't vote yes, so you
 must vote no," we can't go back and provide what may
 be things that can be done to reconstruct or revise
 the development or the decision in its whole, just
 based on what day it happened to be arrived at.
 MR. MULLEN: You've lost me.
 MR. BROWN: The Chair is asking if they
 give him a zone change to an RR-120, can we address
 that, or because that wasn't addressed tonight did
 that have an impact on the final decision on May 17th
 or --
 MR. VANCAMPEN: Yeah. I think what's
 being argued is May 17th they voted yes or no, we'll
 approve this thing; right? But all of the work and
 the time that has been talked about happened prior to
 that. All of the decisions that led up to the

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1 also under the language of the Development Agreement,
 2 which was not finalized until that last night, to
 3 review pretty much everything that's been argued
 4 tonight.
 5 I further argue that if Mr. McMillan had
 6 come in prior to this date, we would have probably
 7 sent him away saying, "Look, you know, it's not right
 8 because the County Council hasn't made a final
 9 determination on it. You've got to go away and wait
 10 until we have a final order."
 11 MR. VANCAMPEN: That's probably a very
 12 good point.
 13 MR. MULLEN: Just let me raise an issue
 14 here. Under Article 8 of our bylaws, it indicates,
 15 "The final disposition of applications may be
 16 accompanied by written findings of fact," and so
 17 forth and so on reasons. And Number 2 says, "In
 18 exercising its powers, the Board by its written
 19 decision of findings and fact, may reverse or affirm,
 20 wholly or partly, or modify the order, requirement,
 21 decision, or determination, and to that end, shall
 22 have all of the powers of the officers from whom the
 23 appeal is taken. And on all applications, may attach
 24 appropriate conditions and may direct the issue of
 25 permit. That's what was discussed way early in this

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1 process, if we can make changes or make
2 recommendations back to the County Council to do
3 something with it. This is what gives us the
4 authority to do that, I believe. Maybe that's not
5 how you feel, Mr. Chairman.
6 CHAIRMAN LUNDGREN: I don't disagree with
7 what we have in there. I think that's inherent. So
8 given that lengthy -- do we have additional
9 discussion on this issue?
10 MR. VANCAMPEN: I was going to say that if
11 we assume that the Development Agreement is the order
12 or decision or determination from the County Council,
13 then part of that is probably for our interpretation;
14 is that not accurate? Would that be a way to maybe
15 phrase a motion?
16 CHAIRMAN LUNDGREN: All right. Let's hear
17 your motion.
18 MR. VANCAMPEN: I move that the
19 Development Agreement that was reached or approved on
20 May 17, 2005, and all proceedings that led up to it,
21 are subject to review by the Board of Appeals in the
22 pending appeal.
23 CHAIRMAN LUNDGREN: Do I have a second?
24 MR. BROWN: I'll second that.
25 CHAIRMAN LUNDGREN: That is very good.

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1 Any discussion on the question?
2 MR. MULLEN: Is it limited just to the
3 Development Agreement?
4 MR. VANCAMPEN: And all proceedings that
5 led to it.
6 CHAIRMAN LUNDGREN: Any other discussion?
7 Call for a vote. All in favor?
8 BOARD: Aye.
9 CHAIRMAN LUNDGREN: That motion carries 5
10 to 0.
11 Okay. That covers, I believe, all of the
12 jurisdictional questions which were raised before the
13 Board, of that I have notes. Do any of you have
14 jurisdictional issues in which you believe a finding
15 is appropriate?
16 MR. VANCAMPEN: Do we need to do any of
17 the typical stuff? The parties or residents of
18 Morgan County, or is that just assumed at this point?
19 Or am I thinking too "lawyer"? I can't even speak
20 English. Can we go home yet?
21 CHAIRMAN LUNDGREN: No, actually, I think
22 that would be appropriate that we make a finding that
23 -- well, we only need to make a finding of whether or
24 not Mr. McMillan is a resident of Morgan County.
25 MR. VANCAMPEN: Yes. Just something that

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1 gets it properly before the Board.
2 CHAIRMAN LUNDGREN: All right. Let's have
3 a motion.
4 MR. MULLEN: I'll make a motion to duly
5 note that Mr. McMillan is a resident of Morgan County
6 at that address that he so stated.
7 CHAIRMAN LUNDGREN: Do I have a second on
8 that?
9 MR. VANCAMPEN: I second that.
10 CHAIRMAN LUNDGREN: All in favor?
11 (Aye vote taken.)
12 CHAIRMAN LUNDGREN: Opposed?
13 5 to 0. All right. Now, the question
14 comes whether or not we want to adjourn or whether we
15 want to wind our way through the list of facts
16 regarding the issues that are placed before us.
17 MR. MCCLELLAN: I say let's go forward
18 while it's fresh on our minds.
19 CHAIRMAN LUNDGREN: All right. Any
20 objections to going forward?
21 MR. VANCAMPEN: Well, nothing is very
22 fresh on my mind at this point.
23 CHAIRMAN LUNDGREN: In the rough outline,
24 rough order, I believe the next question that would
25 be appropriate to address is a factual question of

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1 whether or not the Wilkinson shop was a legally
2 established nonconforming use prior to the
3 application and grant of 517.
4 MR. MCCLELLAN: In other words, for us lay
5 persons, is it okay to grandfather it?
6 CHAIRMAN LUNDGREN: That's exactly what I
7 said. I'm getting caught up in that stuff.
8 Discussion?
9 MR. VANCAMPEN: You guys put lawyers on
10 the board.
11 MR. BROWN: We're only talking, then,
12 about the construction business. We're not talking
13 about the bed and breakfast, which is a commercial
14 entity, too?
15 CHAIRMAN LUNDGREN: Right now, we're just
16 going to do one small fact at a time. We need to
17 make a finding of whether or not the shop was a
18 legal, nonconforming, and a grandfathered use at the
19 time of the application.
20 MR. VANCAMPEN: I have to say that I'm in
21 fundamental agreement with the McMillans on this
22 because it seems to me like -- it seems like that
23 they're trying to sort of stretch things to enable
24 him to keep the shop that he built or remodeled way
25 late in this process. And it doesn't seem to me like

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1 storing heavy equipment and plumbing pipes and
2 whatnot, or even working off of that ten acres
3 justifies the grandfathering of this recently
4 remodeled shop as a home for his contracting
5 business.
6 CHAIRMAN LUNDGREN: Other comments?
7 MR. McCLELLAN: Well, I tended to get
8 swayed the other way by the argument, but that was
9 just -- that's how I was convinced.
0 MR. MULLEN: I don't see any proof at all
1 of any permits being issued. Back when the Land Use
2 Code was in effect in 1964, something should have
3 been able to come forward from that point or at least
4 in the '70s. And if there were changes that were
5 made to the property in use of the property, those
6 should have been permitted uses. In my estimation,
7 in working for the Planning Commission, those were
8 things that we looked for, and we had some
9 nonconforming uses that came up before us from time
0 to time, and sometimes there wasn't any evidence to
1 work from. But for the most part, there was. And I
2 just don't see -- I'm not convinced that the evidence
3 shows that this should be grandfathered.
4 MR. BROWN: When we dealt with these
5 issues on Planning and Zoning, it's my belief when he
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1 had been done about it. The question is whether or
2 not it actually had been brought to the attention of
3 the County. And I don't think laches can apply to a
4 government entity performing its duties. So even
5 though the government doesn't perform its duties for
6 a given period of time, that doesn't stop the
7 government from performing their duties in the
8 future. And if the property shop never had a
9 building permit, it was never given a conditional use
10 permit, and that was simply overlooked and the
11 business went on, I think when the County discovers
12 that, that they have an obligation to take an action.
13 MR. VANCAMPEN: So what you're saying is
14 if I speed every day, I can still get pulled over for
15 it, is basically what you're saying; right? Because
16 the fact that I speed every single day and don't get
17 caught, or don't get noticed, doesn't mean that I can
18 claim to the highway patrolman who pulls me over,
19 "Hey, I speed every day."
20 CHAIRMAN LUNDGREN: That's true.
21 MR. VANCAMPEN: Right? Is that about what
22 you're saying?
23 MR. BROWN: Well, it never came to
24 anybody's attention when it was a farm and a quasi-
25 construction company working out of a farm. But once
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went to a high-density development, I think when it
was a dairy and agricultural, I think there was
construction stuff around. I think there was
equipment to do construction, along with the farm,
that was probably used for both. I've had a little
experience there. And I think when you have high
density, if it was still a dairy do you want to run a
construction business there? I would be all in favor
of it. But when you change the zoning, I don't see
how we can grandfather a farm/construction
combination there and grant it after the zoning was
changed that would make this high density. I just
don't see it. I don't know how they came up with
that.
MR. VANCAMPEN: Well, in Mr. Wright's
argument, you know, that the objection hasn't been
raised until now, but it hasn't been County
sanctioned until now. And if we move him out of
there, it's going to cause the loss of use of his
land or some sort of other detrimental effect on him.
That sounds more like a variance to me than what
we're actually supposed to be talking about here.
That argument is a variance argument; isn't it?
CHAIRMAN LUNDGREN: Here's a question.
Mr. Wright talked about laches, the fact that nothing
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1 it becomes a high-density development, residential
2 development, then it becomes an issue.
3 CHAIRMAN LUNDGREN: I also have a problem
4 with the chain of use on the property. I think it's
5 pretty clear that Harry was running a construction
6 business on the entire ten acres.
7 MR. BROWN: Sure.
8 CHAIRMAN LUNDGREN: I think there becomes
9 a change in what's going on there sometime after
10 Harry retires, I think there's a fundamental change
11 that goes on there. And there appears to be a period
12 of time there when the shop was used solely for
13 maintenance of the water district. And, Sherrie, did
14 you find that information?
15 MS. CHRISTENSEN: About the --
16 CHAIRMAN LUNDGREN: About the public use.
17 MS. CHRISTENSEN: Oh, I'm sorry. I think
18 I got sidetracked.
19 CHAIRMAN LUNDGREN: I think -- I don't
20 think a public use relates to a zone. For example,
21 you can have maintenance of power substations and
22 pumping stations and all sorts of quasi-commercial
23 entities in residential zones and parks. And the
24 fact that they were maintaining a public use
25 activity, I don't know that that protects them from a
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1 legally established nonconforming use. I think
2 there's a gap period in there.

3 MR. MULLEN: If this happens under
4 culinary water, the C-N Zone, which is what we would
5 have to apply here because of the PUD overlay, it is
6 a conditional use that requires a conditional use
7 permit for culinary water. It's under utilities
8 rights -- maybe that's not the right one. But there
9 are public use requirements or allowances in the Code
10 here, both in residential and in the commercial
11 districts. For example, airports are allowed in some
12 districts but not in others, and that's public use.
13 And also substations and things like that.
14 Throughout the Code, there are a number of those that
15 are sprinkled throughout here and allowed in most
16 districts. But I can't be specific with that.

17 MS. CHRISTENSEN: They're listed in the
18 zones as, "Public and quasi-public facilities in
19 uses, such as cemetery, churches, essential service
20 facilities," which I would take to be water companies
21 or sewer companies. And they're listed as
22 conditional uses in all zones. In the current Code.
23 I can't speak to what the Code was how many years ago
24 when Wilkinson Water was being operated from that
25 location. At this time, I can't.

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1 not a legally established nonconforming use prior --
2 and that shouldn't be the date of application, that
3 should be May 17th, I assume.

4 MR. VANCAMPEN: Sure.

5 CHAIRMAN LUNDGREN: Is that your motion?

6 MR. VANCAMPEN: Does that have the same
7 effect of calling baloney on the grandfathering
8 thing?

9 CHAIRMAN LUNDGREN: Yes.

10 MR. VANCAMPEN: Okay. That is my motion.

11 CHAIRMAN LUNDGREN: Do we have a second?

12 MR. MULLEN: I'll second it.

13 CHAIRMAN LUNDGREN: Any further
14 discussion?

15 MS. CHRISTENSEN: Do you need to make
16 findings of that?

17 CHAIRMAN LUNDGREN: The finding is the
18 Wilkinson shop was not a legally established
19 nonconforming use prior to the change of zoning.

20 MS. CHRISTENSEN: Based on -- I was just
21 wondering if you might need findings of fact as to
22 why you established that.

23 CHAIRMAN LUNDGREN: I think we will
24 probably need that. And in addition, state your
25 reasons why not.

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1 MR. VANCAMPEN: So it seems like -- well,
2 if I were to start, like, maybe steering us towards
3 the formation of some sort of a motion or something,
4 then we would call baloney on the grandfathering
5 thing, but recommend to the Planning Commission that,
6 if we do, in fact, remand this thing, that they might
7 consider inviting Mr. Wilkinson to apply for a
8 conditional use permit as a proper way to handle
9 that, rather than grandfather that.

10 MR. MULLEN: No.

11 MR. VANCAMPEN: It's not allowed at all
12 under the PUD?

13 MS. CHRISTENSEN: They would require a
14 zone change or a Code change.

15 MR. VANCAMPEN: Well, and see that was
16 just a good thing that I was starting to go in that
17 direction, rather than --

18 CHAIRMAN LUNDGREN: All right. The Chair
19 will entertain a motion to whether or not the
20 Wilkinson shop was a legally established
21 nonconforming prior use to the date of the
22 application.

23 MR. VANCAMPEN: I move that you add the
24 word "not" to the beginning of that.

25 CHAIRMAN LUNDGREN: The Wilkinson shop was

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1 MR. BROWN: My reason would be that it's
2 still an agricultural zone that would be
3 grandfathered; that's not a big change there because
4 of the dairy or whatever that was in conjunction with
5 the construction company when the zoning change with
6 the high density came along. I think that the
7 grandfather was a stretch.

8 CHAIRMAN LUNDGREN: Well, it has to be
9 grandfathered prior to the time that he makes his
10 application. So it had to be a legal, nonconforming
11 use, prior to consideration by the County Council to
12 allow the PUD and the overlay zoning. It's got to
13 have that legal nonconforming status first.

14 MR. MULLEN: No permits? We don't have
15 any permits? We have no records of permits for
16 either building permits or conditional use permits.

17 MR. VANCAMPEN: Right. Also that there
18 was the gap that you spoke of between the types of
19 construction businesses. I would also add the
20 difference in the condition of the shop prior to and
21 subsequent to the purchase and remodeling by Mr.
22 Wilkinson. He caused it to become a construction
23 business office with a laundry room, and lunchroom,
24 and two offices, and whatever else he got a building
25 permit to do at that point.

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1 CHAIRMAN LUNDGREN: Do I have a second on
2 the motion as expressed with the conditions?
3 MR. MULLEN: I thought I did second it.
4 CHAIRMAN LUNDGREN: I just want to clarify
5 because we made the list after you seconded it.
6 MR. MULLEN: So I re-second it.
7 CHAIRMAN LUNDGREN: Okay. Any additional
8 discussion? Vote? All in favor?
9 (Aye vote was taken.)
10 CHAIRMAN LUNDGREN: Opposed?
11 (Nay vote was taken.)
12 CHAIRMAN LUNDGREN: 4 to 1. Motion
13 carries. And do you want to make an additional
14 motion on that or do you want to make
15 recommendations?
16 MR. VANCAMPEN: No. Because the
17 recommendation I had suggested was roundly rejected
18 as being illegal. So maybe we should wait on that.
19 CHAIRMAN LUNDGREN: I think the next issue
20 raised is whether or not the overlay zone, by its own
21 language, limits its application to town centers.
22 MR. VANCAMPEN: Yeah. Now, I never did
23 catch where that is assigned to in the book. Can
24 somebody direct me there because I would like to read
25 that before we go any further, if that's okay.

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I think Mr. Hathaway might know that
better because he's the one that quoted it.
MR. HATHAWAY: Which section again? The
short-term memory is going quick.
CHAIRMAN LUNDGREN: Can you tell me, is
there a section that limits the application of the
overlay zone to town centers?
MR. HATHAWAY: Yes. It's in the Morgan
County General Plan, Chapter 9 -- oh, wait. I'm
sorry.
MR. MULLEN: 16-35-06.
MR. HATHAWAY: 16-35-06. It's in the
ordinances.
MR. VANCAMPEN: Is that what we're going
to rely on is something that wasn't in effect?
CHAIRMAN LUNDGREN: Well, this is the
overlay zone.
MR. VANCAMPEN: Oh, is that what it is?
All right. So then I should just shut up until I get
there.
CHAIRMAN LUNDGREN: I believe the
applicable language in 16-35-06 is, the
second-to-the- last sentence at the bottom. "A PUD
overlay zone amendment may only be considered and
applied within towns and villages identified by the

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1 General Plan. The minimum size for the PUD overlay
2 zone will be 2.0 acres in towns and villages or 1.0
3 acre within a town center."
4 So I don't think it says it has to be in a
5 town center, but it does have to be in a town and
6 village. Is there more information you can provide
7 for us on that?
8 MR. HATHAWAY: The County plan, itself,
9 which has a town center language --
10 MR. VANCAMPEN: And this was the General
11 Plan which was in effect at the time; is that
12 correct?
13 MR. HATHAWAY: And by the way, the
14 ordinance, the language is identical, although the
15 numbering is a little different. It's the same
16 language as in the existing one. And it had to do
17 specifically with affordable housing.
18 CHAIRMAN LUNDGREN: Repeat that, please.
19 MR. HATHAWAY: It has to do with
20 affordable housing.
21 CHAIRMAN LUNDGREN: Sherrie, is this
22 defined as a subdivision? Is it a cluster?
23 MS. CHRISTENSEN: No.
24 CHAIRMAN LUNDGREN: No.
25 MS. CHRISTENSEN: It's within the

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1 neighborhood of the Cottonwood/Rosehill/Fox Hollow --
2 MR. HATHAWAY: You're looking for the
3 passage where it defines the Morgan -- it was the
4 Mountain Green town center. Is that the provision
5 you're looking for?
6 CHAIRMAN LUNDGREN: What the question is,
7 and we need help here, is there language that
8 requires the application of the PUD overlay zone only
9 in town centers?
10 MR. HATHAWAY: No. There's no language.
11 It says a village or town, and then the affordable
12 housing specifically talked about town centers. And
13 then the Morgan (sic) Green -- well, the General Plan
14 said that the Mountain Green town center was the
15 intersection of the Trapper's Loop --
16 CHAIRMAN LUNDGREN: Where's the language
17 that says that affordable housing should be built in
18 town centers?
19 MR. HATHAWAY: That's in the General Plan,
20 Chapter 9, Policy 1.7.1.
21 MR. HATHAWAY: And then on Page 15, it
22 identifies the centers and neighborhoods. And that's
23 under 3.1.2.
24 CHAIRMAN LUNDGREN: All right. Then I
25 guess the question is whether or not this

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1 high-density development proposed by Coventry Cove
2 can be built outside of a town center.
3 Do we have a policy, Sherrie?
4 MS. CHRISTENSEN: I would just comment
5 that it is my understanding that a PUD has been used
6 and can be used outside of the town centers because
7 it can also be used outside of towns and villages.
8 On Page 26, in Policy 2.1.5 of Chapter 4, the
9 statement says that -- it's speaking to a development
10 outside of towns and villages, "Clusters may be
11 developed outside town, villages, or resorts through
12 the PUD, PRED, or MGR process." But only if they --
13 so it's implied that that PUD in the other
14 developments, too, was coming in as clusters outside
15 of town centers and obviously outside of towns.
16 MR. VANCAMPEN: Tell me again where you
17 just read from.
18 MS. CHRISTENSEN: Page 26, Policy 2.1.5.
19 MR. VANCAMPEN: Oh, okay.
20 MR. MULLEN: That also indicates that it
21 has to fall under the policy of 2.1.4, on the
22 previous page. Only if it qualifies for development
23 under the guidelines of 2.1.4. 2.1.4 says, "In order
24 to be approved, such amendments should demonstrate to
25 the satisfaction of the Planning Commission or

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1 governing body the development area (a) will
2 significantly advance the goals of the General Plan
3 and applicable area plan in preserving agricultural
4 and rural uses of the land; will not negatively
5 impact the political, cultural, social values and
6 institution in Morgan County, and provide greater
7 value and preservation to Morgan County and its
8 residents than would be possible if a landlord were
9 to develop within current rural development
10 guidelines in existing zoning.
11 MS. CHRISTENSEN: But that actually goes
12 to the overall goal number 2, which is, "Land
13 development should be organized in clustered
14 patterns." So Policy 2.1.5, just specifically speaks
15 to how the development is to be done outside of that.
16 CHAIRMAN LUNDGREN: Well, but this isn't a
17 cluster, so it doesn't apply anyway.
18 MS. CHRISTENSEN: Right. It's within a
19 neighborhood.
20 CHAIRMAN LUNDGREN: And I guess the
21 question is still whether, and I guess this, at this
22 time, whether the land use policies restrict
23 high-density development within a town or village
24 center. Let me repeat that. The question is whether
25 or not the land use policies restrict high-density

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1 development to town or village centers.
2 MR. MULLEN: In the descriptions of the
3 area plans and the general plans, as well, I believe
4 it states, and I don't have a cite for this, but the
5 town centers are where the commercial districts are
6 and there's some housing in that area that's more
7 dense, and as you go further from that town center,
8 the density decreases. That's the intent of the
9 planning process that we went through that we don't
10 have. It's more appropriate in the town centers to
11 have that. I don't know if we can't, but that was
12 the idea under the General Plan as we've stated it
13 here. Is that your understanding, Sherrie, generally
14 speaking?
15 MS. CHRISTENSEN: Yes. But I would like
16 to make a caveat. I think you need to be very
17 careful defining this subdivision as high density.
18 While the lots are small, the overall -- the entire
19 project is 9.84 acres. And so 18 dwelling units on
20 9.84 acres would not necessarily qualify as high
21 density.
22 CHAIRMAN LUNDGREN: What does qualify as
23 high density?
24 MS. CHRISTENSEN: In generalist planning
25 practices, you would be looking at something greater

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1 than four units per acre, and this would be
2 approximately two units per acre.
3 MR. BROWN: That argument would be true if
4 the ground was left open, but the ground is being
5 used for other things. If it was just open space or
6 a value to the County, but this ground will be used
7 for other things.
8 MS. CHRISTENSEN: But I believe --
9 MR. BROWN: Storage sheds, bed and
10 breakfast, et cetera. So that does not apply.
11 MS. CHRISTENSEN: There is open space
12 included in the zoning, though.
13 MR. BROWN: Yes. But you grant that to
14 all of it to get that kind of density, not with bed
15 and breakfast. And my understanding of Planning and
16 Zoning, as long as we sort of -- is to get that kind
17 of density, the use of the land is open space.
18 CHAIRMAN LUNDGREN: Is the density greater
19 than Mr. Wilkinson could achieve without using the
20 overlay zone?
21 MS. CHRISTENSEN: Yes.
22 CHAIRMAN LUNDGREN: Second question. What
23 is the legal effect of a policy?
24 Mr. Wright, Mr. Hathaway, Mr. Hammond, I
25 would invite your comments on that question.

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1 MR. HAMMOND: A policy is not the same as
2 an ordinance. An ordinance must be followed and a
3 policy is just for guidance.

4 CHAIRMAN LUNDGREN: And on what -- go
5 ahead.

6 MR. MULLEN: Under the PUD overlay zone,
7 however, the General Plan must be followed. That's
8 very clear about that. Whether it's a policy or
9 objective or a goal, it needs to be in concert with
0 General Plan and PUD overlay zone. Now, again, you
1 may say the policy is somewhat flexible, and that's
2 up for debate, so we need to discuss that.

3 MR. HATHAWAY: Well, my view is, and I
4 concur with Mr. Hammond on this, the ordinance must
5 be followed. The policy may be comparable to the
6 Constitution, and the ordinance is the statutory
7 scheme that underpins it. But the policies are the
8 objectives and goals, certainly; but the ordinance
9 that the County enacted says "shall." "To ensure
0 compatibility with surrounding neighborhoods,
1 environment must be consistent with the Morgan County
2 General Plan." And so it's hard to say, "Well, you
3 can kind of disregard one," because if you disregard
4 the one, you're going to be in violation of the
5 ordinance. So I think that it really has -- while

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it's more of an objective, it still has the force of
law.

CHAIRMAN LUNDGREN: Mr. Wright, I'm going
to pick on you because you are the County attorney.
How do you counsel with the County Council regarding
the policy as far as their requirement to adhere to
it?

MR. WRIGHT: I would look at the statute,
I would look to the ordinance, as to how that
language applies to the General Plan. There are some
"for instances." If there's an ordinance that says
that the Planning Commission recommends a zoning
change, it has to do so showing that it's in
accordance with the General Plan. That doesn't apply
to here. You've got the language in 16-35-020 that
refers to uses that are permitted. And then it talks
about, "Which are contrary to the General Plan goals,
policies, or objectives, or are incongruous may be
disallowed." It's not mandatory.

And I'm looking down at the next section,
as well, with respect to that. It has some language
in there that the use is essential for the enjoyment
of substantive property rights.

So whether or not this ordinance -- I
haven't looked at this ordinance, to whether it

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1 requires specifically, absolute compliance with this
2 or not. And then the question is -- and I didn't
3 find it, I apologize. Where was the town center one
4 that you referred to? Page what?

5 MS. CHRISTENSEN: 1.7.1.

6 MR. WRIGHT: I'm not sure that I can give
7 you an opinion that says it absolutely has to require
8 that. I haven't researched, I haven't looked at that
9 issue, and so I'm not prepared at this point to tell
10 you one way or the other.

11 CHAIRMAN LUNDGREN: You know, and I'm glad
12 we're talking about this. Let me throw my spin on
13 it. "The appropriate areas within Morgan County
14 where affordable housing may be appropriate are town
15 and village centers." I think that leaves some
16 discretion.

17 MR. WRIGHT: It is not mandatory.

18 CHAIRMAN LUNDGREN: Okay.

19 MR. MULLEN: May I bring up a point?

20 CHAIRMAN LUNDGREN: Please do.

21 MR. MULLEN: Mr. Wright, in the ordinance
22 for the PUD overlay zone, Ordinance CO-04-16, which
23 is not in our packets here, but it's in the County
24 ordinance, it states in 18.5.6, "The governing body
25 may grant conditional approval of a PUD overlay zone

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1 amendment, if it finds and cites specific provisions
2 demonstrating that the application is in accord and
3 consistent with the General Plan and with the
4 policies and provisions of the PUD." That's one
5 sentence. It was something that you're looking for.
6 I think it's in the ordinance itself, instead of just
7 in the --

8 CHAIRMAN LUNDGREN: Well, I think that's
9 made in Exhibit E to the Development Agreement. That
10 statement is there.

11 MR. MULLEN: It may be, yeah.

12 MR. WRIGHT: Let me just find that right
13 -- which -- in the codified, you've got that?

14 MR. MULLEN: I'm sorry. Say again?

15 MR. WRIGHT: In the codified ordinance?

16 MR. MULLEN: I just have the ordinance
17 here.

18 MR. WRIGHT: I know. Do you know what
19 section in the codified --

20 MR. MULLEN: No.

21 CHAIRMAN LUNDGREN: Is there a section
22 there?

23 MR. MULLEN: No, there is no section
24 there. It's 18.5.6 in the ordinance, but I don't
25 know where it is in the Code here. I will look for

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<p>SHEET 39</p> <p>1 that.</p> <p>2 MS. CHRISTENSEN: It would be 35-05-06.</p> <p>3 MR. WRIGHT: I think it still begs the</p> <p>4 question of fact, is the policy mandatory or is it</p> <p>5 discretionary?</p> <p>6 MS. CHRISTENSEN: 16-35-070 states, the</p> <p>7 very last section, "All PUD applications must</p> <p>8 strictly comply with the Morgan County General Plan."</p> <p>9 MR. MULLEN: Yes.</p> <p>10 MR. WRIGHT: Yes.</p> <p>11 CHAIRMAN LUNDGREN: The Chair will</p> <p>12 entertain a motion that the County Council has</p> <p>13 discretion where to locate high-density developments,</p> <p>14 whether or not they're in a town center or not, as</p> <p>15 long as they are located within a town or village.</p> <p>16 MR. MCCLELLAN: I so move.</p> <p>17 CHAIRMAN LUNDGREN: Do we have a second?</p> <p>18 MR. MULLEN: One moment, please.</p> <p>19 MR. BROWN: State that again.</p> <p>20 CHAIRMAN LUNDGREN: The motion is to make</p> <p>21 a finding that the County Council has discretion to</p> <p>22 locate high-density developments --</p> <p>23 MR. VANCAMPEN: Stop there for just a</p> <p>24 minute because we were cautioned not to call it high</p> <p>25 density; weren't we?</p> <p>305</p>	<p>1 MR. MULLEN: The Mountain Green Area Plan,</p> <p>2 Chapter 4.</p> <p>3 MR. VANCAMPEN: Mr. Chairman, could I have</p> <p>4 five minutes to clear my head and get a breath of</p> <p>5 fresh air? I'm getting awfully punchy.</p> <p>6 CHAIRMAN LUNDGREN: You know, there's no</p> <p>7 way we're going to get done with this very quickly.</p> <p>8 MR. BROWN: How many more items have you</p> <p>9 got?</p> <p>10 CHAIRMAN LUNDGREN: I've got another page</p> <p>11 and a half. We haven't finished the first page yet.</p> <p>12 We're at the bottom of the first page. And so we've</p> <p>13 been going on for an hour and a half, and we have</p> <p>14 been here since --</p> <p>15 MR. VANCAMPEN: For seven hours.</p> <p>16 CHAIRMAN LUNDGREN: -- sometime after the</p> <p>17 First Coming.</p> <p>18 I'm going to suggest that we answer this</p> <p>19 question and then we adjourn and find an appropriate</p> <p>20 time that we can re-visit this. There's just no way</p> <p>21 we can get done until it's very, very late, and I</p> <p>22 think we're all very tired. So I'm going to call for</p> <p>23 the motion on this question, and if we have a motion.</p> <p>24 MR. VANCAMPEN: I have lots of emotions.</p> <p>25 MR. BROWN: Will you read that again in</p> <p>307</p>
<p>1 CHAIRMAN LUNDGREN: Well, we haven't made</p> <p>2 a finding of whether or not this is high density or</p> <p>3 not. I'll just put it this way: The County Council</p> <p>4 has discretion to locate developments, including</p> <p>5 high-density developments, outside of town center,</p> <p>6 but it must occur within a town or village.</p> <p>7 MR. BROWN: If that's the case, then</p> <p>8 they're illegal.</p> <p>9 CHAIRMAN LUNDGREN: Well, we'll get there.</p> <p>10 MR. MULLEN: Point? In the Mountain Green</p> <p>11 area -- in the Mountain Green Area Plan, Chapter 4,</p> <p>12 "General Development Guidelines," Item Number 4.11,</p> <p>13 Policy. It states, "In accordance with the</p> <p>14 principles of the General Plan, and since the</p> <p>15 preservation of rural and natural environmental</p> <p>16 features is of prime importance to this community,"</p> <p>17 this is Mountain Green, "high-density residential</p> <p>18 zoning is not appropriate outside of town or resort</p> <p>19 centers."</p> <p>20 CHAIRMAN LUNDGREN: I knew we had it.</p> <p>21 MR. MULLEN: And the area plan is part of</p> <p>22 the General Plan.</p> <p>23 CHAIRMAN LUNDGREN: What does that say?</p> <p>24 MR. MULLEN: It's Chapter 4.11, Policy.</p> <p>25 MR. VANCAMPEN: Of which?</p> <p>306</p>	<p>1 the Mountain Green Area Plan, please. Where are you?</p> <p>2 MR. MULLEN: 4.11, Policy, Chapter 4.11.</p> <p>3 It's down near the bottom of the paragraph. "In</p> <p>4 accordance with the principles of the General Plan,</p> <p>5 and since the preservation of rural and natural</p> <p>6 environmental features is of prime importance to this</p> <p>7 community, high-density residential zoning is not</p> <p>8 appropriate outside of town or resort centers."</p> <p>9 CHAIRMAN LUNDGREN: I'm going to make</p> <p>10 another suggestion. I'm going to make a suggestion</p> <p>11 that we table at this point. I don't think we've</p> <p>12 finished discussing that adequately. It's almost</p> <p>13 2:00 a.m.</p> <p>14 MR. VANCAMPEN: Do you have a motion?</p> <p>15 CHAIRMAN LUNDGREN: The Chair would</p> <p>16 entertain a motion to continue this hearing at a time</p> <p>17 convenient to all of the parties.</p> <p>18 MR. BROWN: Do we have to advertise it in</p> <p>19 two weeks or can we get right to it on another</p> <p>20 evening?</p> <p>21 CHAIRMAN LUNDGERG: Sherrie?</p> <p>22 MS. CHRISTENSEN: Even if we were under</p> <p>23 the Open Public Meetings Act, we would only need</p> <p>24 24-hours advance notice, but Attorney Wright is</p> <p>25 indicating we're not. But to that end, I think in</p> <p>308</p>

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1 all fairness, I believe that's our policy, that we
2 would want to give at least 24 hours.
3 MR. BROWN: I would like to stay with it.
4 I mean, I don't want to let two weeks go by.
5 MS. CHRISTENSEN: You wouldn't have to
6 wait; 24 hours is all you would need.
7 CHAIRMAN LUNDGREN: Do we have to simply
8 post notice or do we have to publish it?
9 MS. CHRISTENSEN: Post it.
10 MR. VANCAMPEN: Okay. I have a motion.
11 MR. MULLEN: Does that mean Saturday?
12 MR. VANCAMPEN: It occurred to me a few
13 minutes ago as to why the attorneys were so happy to
14 stay here this late is because tomorrow is a holiday,
15 and most all of them are going to be home sleeping
16 in. It's Veteran's Day. All of the attorneys have
17 tomorrow off. I don't, but I figured everybody else
18 does.
19 MR. HATHAWAY: Could I make a novel
20 suggestion, perhaps? This is an adjudicative
21 proceeding. Both parties have addressed their
22 issues. There's no need for a continued public
23 hearing. The deliberations can be done behind closed
24 doors. It's in the discretion of the panel.

CHAIRMAN LUNDGREN: Actually we had a

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discussion about that and I don't think we have the
power to do it behind closed doors.

MR. HATHAWAY: If it makes any difference,
if it will expedite the process. The McMillans will
waive notice of the meeting if you want to schedule
it at the soonest convenience that the parties are
able to do it. We're eager to do it, and we're eager
to accommodate recessing immediately.

CHAIRMAN LUNDGREN: What's your motion,
Mr. Vancampen?

MR. VANCAMPEN: The motion is to table the
current discussion with regard to PUD overlay, and
continue this meeting to a time determined by the
Board at the convenience of the parties.

CHAIRMAN LUNDGREN: Do we have a second on
the motion?

MR. McCLELLAN: I second it.

CHAIRMAN LUNDGREN: We have a second.

Discussion on the motion?

MR. VANCAMPEN: Do we need to have a time
and place before we vote on that?

CHAIRMAN LUNDGREN: We'll do that next.

All in favor, say, "aye."

BOARD: Aye.

CHAIRMAN LUNDGREN: All right. Ladies and

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1 gentlemen, we want to make a time available for you.
2 So, Sherrie, if you have some suggestions as to a
3 calendar, and can you give us your input as to your
4 availability or if you want to be here.

5 MS. CHRISTENSEN: Well, you tell me when
6 you -- we can't do it -- do you want to go through
7 the weekend? Do you want to go Monday night?
8 Tuesday night this building, this room would not be
9 available. Wednesday night it would be. Monday or
10 Wednesday night.

11 CHAIRMAN LUNDGREN: I'm available Monday
12 night. Anybody not available Monday night? Well,
13 we've got a group of people over there not available.
14 And, Mr. Wilkinson, we want you here. Do we have
15 another room we can use on Tuesday?

16 MR. HATHAWAY: I am not available on
17 Tuesday.

18 MR. WRIGHT: I'm not available, either.

19 CHAIRMAN LUNDGREN: Wednesday night?

20 MR. HATHAWAY: I'm not available. I am in
21 the middle of a preliminary injunction hearing in
22 Salt Lake that will continue from Wednesday morning
23 and go through the night. And it would really not be
24 practical for me to sort of take leave of that and
25 come up here in the evening. So really, Monday I'm

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1 available, but Tuesday through the remainder of the
2 week --

3 CHAIRMAN LUNDGREN: You have co-counsel
4 with you. Would you be comfortable with co-counsel
5 attending?

6 MR. HATHAWAY: Well, it so happens that
7 he's co-counsel in the same proceeding. We're
8 defending -- or we're representing the public
9 employees of the entire state of Utah. It's sort of
10 a time-sensitive critical matter that we're trying to
11 get resolved before the first of the month.

12 CHAIRMAN LUNDGREN: Mr. Hammond, is there
13 anyway you can -- I believe you're the only one with
14 a conflict Monday night. No. The four of you had
15 conflicts on Monday night. I'm sorry. I missed
16 everybody's hands.

17 MS. CHRISTENSEN: Do you want to do it
18 tonight? Friday night?

19 CHAIRMAN LUNDGREN: What about Friday
20 night? What about tomorrow night?

21 MS. CHRISTENSEN: Tonight?

22 CHAIRMAN LUNDGREN: What about yesterday
23 night? We should have done it then.

24 MR. VANCAMPEN: That's when we started.

25 MS. CHRISTENSEN: I think we also need to

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<p>SHEET 40</p> <p>1 make sure our court reporter can be here.</p> <p>2 CHAIRMAN LUNDGREN: You can sleep over</p> <p>3 some place. Does anybody have a conflict with</p> <p>4 tomorrow night?</p> <p>5 MR. VANCAMPEN: We'll make arrangements to</p> <p>6 be here.</p> <p>7 CHAIRMAN LUNDGREN: Mr. Wright, do you</p> <p>8 have a conflict with being here?</p> <p>9 MR. WRIGHT: Yes, I do. I'm preparing for</p> <p>10 a trial that starts next week and so it will be very</p> <p>11 difficult for me to be here.</p> <p>12 MR. BROWN: Tomorrow night, or tonight?</p> <p>13 MR. WRIGHT: Yes, and Saturday.</p> <p>14 MR. VANCAMPEN: Let's just flip a coin on</p> <p>15 the rest of it and go home.</p> <p>16 CHAIRMAN LUNDGERG: All right. Should we</p> <p>17 continue on and keep these people all night and vote</p> <p>18 it out?</p> <p>19 MR. VANCAMPEN: No.</p> <p>20 CHAIRMAN LUNDGREN: I'm open to</p> <p>21 suggestions of when we can hear this matter.</p> <p>22 MR. VANCAMPEN: I think I heard this</p> <p>23 gentleman say they would make arrangements to be</p> <p>24 here.</p> <p>25 MR. HATHAWAY: We'll be here Friday, we'll</p> <p>313</p>	<p>1 to be public.</p> <p>2 MR. BROWN: Monday, the 21st?</p> <p>3 CHAIRMAN LUNDGREN: Actually, you've</p> <p>4 raised a good point here. Let me read again the</p> <p>5 sentence that Chris just read. "The Board must</p> <p>6 review and draw conclusions from facts presented by</p> <p>7 the Complainant regarding a specific parcel of</p> <p>8 property following procedures that resemble those</p> <p>9 that are followed by a court of law." That's under</p> <p>10 "Conduct Of The Appeal Authority," Section 3, on Page</p> <p>11 3. The last time I checked, the court holds its</p> <p>12 hearings but goes into closed session to enter its</p> <p>13 decisions, more often than not, and announces it in a</p> <p>14 public meeting.</p> <p>15 MR. HATHAWAY: Mr. Chair, for whatever my</p> <p>16 experience may be worth, I have appeared in a few of</p> <p>17 these, and I've also appeared in the context of other</p> <p>18 administrative hearings of various agencies of the</p> <p>19 state for 23 or 24 years, and this is the first time</p> <p>20 I've been at an open session when the deliberation</p> <p>21 process was going on. So I was a little surprised</p> <p>22 with the proceeding.</p> <p>23 CHAIRMAN LUNDGREN: And we may have been</p> <p>24 ill-advised. So then I'm going to request a motion</p> <p>25 that we adjourn for tonight, that we meet in</p> <p>315</p>
<p>1 be here Saturday, and we'll be here Monday.</p> <p>2 MR. VANCAMPEN: Okay. I misunderstood,</p> <p>3 then.</p> <p>4 CHAIRMAN LUNDGREN: Tonight, tomorrow, and</p> <p>5 Monday.</p> <p>6 MR. HATHAWAY: Yes.</p> <p>7 MR. WRIGHT: Can I ask a question as to</p> <p>8 why you made the determination that a quasi judicial</p> <p>9 body has to do this in an open meeting?</p> <p>10 MR. VANCAMPEN: Where is that little blue</p> <p>11 book?</p> <p>12 CHAIRMAN LUNDGREN: We actually had a</p> <p>13 discussion about it one night. And I think you were</p> <p>14 quoted, even though you weren't there. You're cursed</p> <p>15 with being so famous.</p> <p>16 MR. VANCAMPEN: This little manual we</p> <p>17 have, this blue manual that they gave us in training,</p> <p>18 called "Land Use Appeals & Variances," that Sherrie</p> <p>19 provided to us, says, "The appeal of Board is not a</p> <p>20 court of law; however, its hearings and discussions</p> <p>21 must follow any of the procedures practiced by a</p> <p>22 judicial court. The Board is to hold public meetings</p> <p>23 on matters to which they are authorized, avoid ex</p> <p>24 parte contact, provide opportunities to cross</p> <p>25 examine." So I think that we decided that we needed</p> <p>314</p>	<p>1 executive session to finish our findings and</p> <p>2 conclusions of law.</p> <p>3 MR. BROWN: Tonight?</p> <p>4 CHAIRMAN LUNDGREN: At a time convenient</p> <p>5 to all of us, we'll get to that in a second, with the</p> <p>6 consent and approval from the parties present.</p> <p>7 MR. VANCAMPEN: So moved.</p> <p>8 CHAIRMAN LUNDGREN: Do I have a second?</p> <p>9 MR. MULLEN: I'll second it.</p> <p>10 CHAIRMAN LUNDGREN: Mr. Hathaway, do you</p> <p>11 have any objections to us proceeding to enter our</p> <p>12 findings of facts and conclusions in a closed</p> <p>13 session?</p> <p>14 MR. HATHAWAY: No objection.</p> <p>15 CHAIRMAN LUNDGREN: Mr. Wright?</p> <p>16 MR. WRIGHT: I'm going to wait until Mr.</p> <p>17 Hammond responds.</p> <p>18 MR. HAMMOND: May I have a moment, please?</p> <p>19 CHAIRMAN LUNDGREN: You may. Do we have a</p> <p>20 local ordinance that regulates how we issue our</p> <p>21 findings?</p> <p>22 MR. HATHAWAY: The ordinance and the</p> <p>23 statute both just say that it needs to be in writing,</p> <p>24 and it's final once it's written in writing, or once</p> <p>25 it's issued in writing.</p> <p>316</p>

1 CHAIRMAN LUNDGREN: Mr. Hammond?
2 MR. HAMMOND: I haven't confirmed with the
3 county attorney on this, but I'll just throw it out
4 there and you can say what you want. We have a
5 proposal that the Board go ahead and meet in its
6 session to determine the findings and so forth, but
7 that that be open if the parties desire to come and
8 watch; that the parties would not be consulted or
9 anything like that; that the attorneys would not need
10 to be present, just the parties, if they desire.
11 CHAIRMAN LUNDGREN: Mr. Wright?
12 MR. WRIGHT: I'm going to submit it to you
13 based on the request of the Applicant.
14 CHAIRMAN LUNDGREN: I've got a question
15 for you. Are we governed by the Open Meetings Act?
16 MR. WRIGHT: If I had that Act here I
17 would read it to you. If you will look at it, it
18 talks about legislative and executive functions, and
19 it's my opinion, that you are functioning here - not
20 when you do a variance, which is a whole different
21 thing, but in this capacity - as a quasi-judicial --
22 it's quasi-judicial because you're not the court, but
23 you are de facto judicial. And so you're outside of
24 that Open Meetings Act. It doesn't apply. And the
25 deliberation should -- I've never seen anything quite
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1 that the hearing is now closed and all evidence has
2 been accepted; two, that findings simply be made
3 available in writing. I don't think we need a public
4 meeting to make those findings available.
5 MR. BROWN: I agree.
6 MR. VANCAMPEN: With those two additional
7 changes, modifications, I make the motion to table
8 the discussion, to continue a meeting to do our
9 deliberations; the hearing is closed and no more
10 evidence will be accepted or taken; and that we issue
11 a written finding of facts and conclusions of law.
12 MR. MULLEN: I second it.
13 CHAIRMAN LUNDGREN: Any discussions on the
14 motion? All in favor?
15 THE BOARD: Aye.
16 CHAIRMAN LUNDGREN: Ladies and gentlemen,
17 thank you for your phenomenal endurance. We know how
18 difficult this has been on you. But this is a
19 wonderful example of why this is a great country.
20 MR. HATHAWAY: Amen.
21 CHAIRMAN LUNDGREN: This just doesn't
22 happen anywhere else. So thank you all.
23 (Hearing adjourned at 2:17 a.m.)
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like this before. I'll just leave it at that.
CHAIRMAN LUNDGREN: Well, you know what?
None of us have. So you were badly quoted. That's
all I've got to say.
MR. HATHAWAY, do you have any comments you
want to make before we wrap it up?
MR. HATHAWAY: Well, I would have to say
that for the first time, I agree with Mr. Wright,
that we're not subject to the Open Meetings Act, and
I think the deliberations can be done privately, and
we can all meet again to announce the conclusion.
CHAIRMAN LUNDGREN: So, Mr. Hammond, any
last comment?
MR. HAMMOND: No.
MR. VANCAMPEN: I would like to modify my
motion.
CHAIRMAN LUNDGREN: Make your motion, Mr.
Vancampen.
MR. VANCAMPEN: I vote that we table the
current discussions and continue this meeting to a
time where we can deliberate at our convenience, and
then reset another meeting to announce our findings
and conclusions where everybody may be present.
MR. MULLEN: I'm going to make a
suggestion, an amendment to your motion. One, amend
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1 REPORTER'S CERTIFICATE.
2
3 STATE OF UTAH)
4 COUNTY OF SALT LAKE) ss.
5 I, Shantae Rindfleisch, Registered
6 Professional Reporter and Notary Public in and for
7 the State of Utah, do hereby certify:
8 That on November 10, 2005, I was present
9 at the Coventry Cove public hearing, and the
10 proceedings were reported by me in stenotype and
11 thereafter transcribed into typewriting, and that the
12 foregoing 319 pages are a full, true, and correct
13 transcription of said proceedings as set forth in the
14 preceding pages, to the best of my ability to hear
15 and understand the proceedings;
16 I further certify that I am not kin or
17 otherwise associated with any of the parties to said
18 cause of action and that I am not interested in the
19 outcome thereof.
20 WITNESS MY HAND AND OFFICIAL SEAL this
21 20th day of November, 2005.
22
23
24
25
Shantae Rindfleisch, RPR
Notary Public
Residing in Salt Lake County
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Tab D

7. The Governing Body may fix per diem compensation for the members of the Board of Appeals based on necessary and reasonable expenses and on meetings actually attended.

16-06-230 Powers and Duties.

1. The Board of Appeals shall hear and decide;
 - a. requests for variances from the terms of the land use ordinances; and
 - b. appeals from decisions applying the land use ordinance.
2. At a minimum, the Board shall;
 - a. notify each of its members of any meeting or hearing or the board, body, or panel;
 - b. provide each of its members with the same information and access to county resources as any other member
 - c. convene only if a quorum of its members is present; and
 - d. act only upon the vote of a majority of its convened members except as provided in Section 16-06-220(5).

16-06-240 Appeals.

1. The Board of Appeals shall act in a quasi-judicial manner and serve as the final arbiter of issues involving the interpretation or application of land use ordinances.

2. The Board of Appeals may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.

3. Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to the Board of Appeals.

4. The applicant, a board or officer of the county, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within 30 calendar days of the decision, appeal that decision to the Board of Appeals by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

5. The appellant has the burden of proving that the land use authority erred.

6. The Board of Appeal shall review the land use authority's decision administering or interpreting a land use ordinance de novo, and shall determine the correctness of the decision in its interpretation and application of a land use ordinance.

7. Except as otherwise agreed to by the parties and approved by the Board of Appeal, during an appeal hearing, the appellant shall present their case first. The Respondent and other affected parties shall then present their case before the Board of Appeals. If justice requires, the Board may further allow rebuttal from all parties. During these proceeding, both Appellant and Respondent may provide evidence as deemed necessary. Where facts remain in dispute, the Board may permit the examination and cross examination of witness. The Board may ask such questions at such time as they deem appropriate. The Board shall thereafter render its written findings of fact, conclusions of law and decision.

8. A decision of the Board of Appeals takes effect on the date when the appeal authority

issues a written decision. A written decision constitutes a final decision under UCA 17-27a-802(2)(a) or a final action under UCA 17-27a-801(4).

16-06-270 Variances.

1. Any person or entity desiring a waiver or modification of the requirements of the zoning ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest, may apply to the board of Appeals for a variance from the terms of the land use ordinance.

2. The Board of Appeals may grant a variance if:

- a.
 - i. literal enforcement of the zoning ordinance would cause a hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance;
 - ii. there are special circumstances attached to the property that do not generally apply to other properties in the same zone;
 - iii. granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;
 - iv. the variance will not substantially affect the general plan and will not be contrary to the public interest; and
 - v. the spirit of the zoning ordinance is observed and substantial justice done.
- b. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under Subsection 16.06.270(2)(a)(I) the Board of Appeals may not find an unreasonable hardship unless:
 - i. 1. the alleged hardship is located on or associated with property for which the variance is sought; and
 2. the alleged hardship comes from circumstances peculiar to the property, not from conditions that are general in the neighborhood.
 - ii. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under Section 16.06.270(2)(b), the Board of Appeals may not find an unreasonable hardship if the hardship is self-imposed or economic.
- c. In determining whether or not there are special circumstances attached to the property under Section 16.06.270(2)(b), the Board of Appeals may find that special circumstances exist only if the special circumstances:
 - i. relate to the hardship complained of, and
 - ii. deprive the property of privileges granted to other properties in the same zone.

3. The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.

4. Variances run with the land.

5. The Board of Appeals may not grant use variances.

6. In granting a variance, the Board of Appeals may impose additional requirements on the applicant that will:

- a. mitigate any harmful affects of the variance; or
- b. serve the purpose of the standard or requirement that is waived or modified.

16-06-280 District Court Review of Board of Appeals Decision.

1. Any person adversely affected by any decision of a Board of Appeals may petition the